

**Raymond Kwun Sun Lau, PhD candidate, Asia Pacific Centre for the  
Responsibility to Protect, The University of Queensland**  
***Intervention to stop mass atrocities in northern Uganda: first  
protection, then justice?***

**Abstract**

There has been a change in expectations about international response to mass atrocities in the post-Cold War era and, in particular, the aftermath of the 1994 Rwandan genocide. In a bid to ensure that the world never again fails to act, the establishment of the International Criminal Court (ICC) in 1998 and the adoption of the Responsibility to Protect (R2P) principle in the 2005 World Summit mark the birth of two forms of responsibilities: responsibility to punish and responsibility to protect. The interaction of R2P with the ICC, however, reflects an inherent tension between protection of civilians and punishment of perpetrators in the temporal trajectory of international society's response to mass atrocities. Using northern Uganda as a case study, this paper explores the relationship between R2P and the ICC by questioning the temporal ordering of R2P-ICC linkages in international society's response to the twenty-five-year-old conflict. In particular, it explains why invoking ICC judicial intervention instead of R2P political action in the first place tends to be unsuccessful in stopping the ongoing mass atrocities in northern Uganda.

**Keywords**

**Mass atrocities, International Criminal Court, responsibility to protect, international society, Lord's Resistance Army, self-referral**

**Background**

Against the background of the world's failure to respond adequately to the 1994 Rwandan genocide, the development of the responsibility to protect (R2P) principle and the coming into operation of the International Criminal Court (ICC) in 2002 mark the attempt of the international society to come to grips with the thorny question of how best to respond mass atrocity crimes as no universally accepted and effective response mechanism has yet been in place.<sup>1</sup> In terms of international society's response to genocide and mass atrocities, the idea of responsibility to protect and the reviving practice of international criminal justice have given birth to two forms of responsibilities: responsibility to protect and, namely, responsibility to punish.

Taken together, these two forms of responsibilities can be understood as a change in expectations about international response to mass atrocities. In hindsight, a major focus of attention in the post-genocide era is not the Rwandan genocide itself, but rather the impact of the international society's failure to intervene on subsequent normative developments in international relations. Jennifer Welsh frames these changing expectations as 'the Rwanda Effect', which means the international community's inadequate response to the Rwandan genocide provided the catalyst for the development and endorsement of the R2P principle.<sup>2</sup>

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<sup>1</sup> Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, D.C: Brookings Institution Press, 2008), p. 11.

<sup>2</sup> Jennifer Welsh, 'The Rwanda Effect: Development and Endorsement of the "Responsibility to Protect"', in Phil Clark & Zachary Kaufman (ed.), *After Genocide: Transitional Justice, Post-Conflict*

The content of 'the Rwanda Effect', however, has also placed more demands on strengthening international judicial response to mass atrocities by holding perpetrators accountable.

Amidst the changing international expectations, the ongoing war between the Lord's Resistance Army (LRA) and the Government of Uganda (GOU) is now in its 25<sup>th</sup> year, making it one of Africa's longest running conflict. By condemning the war that is directed and targeted at the civilian population, the UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Jan Egeland mourned the conflict in northern Uganda as 'the biggest forgotten, neglected humanitarian emergency in the world today'.<sup>3</sup>

'I cannot find any other part of the world that is having an emergency on the scale of Uganda, that is getting such little international attention...' 'It is a moral outrage' that the world is doing so little for the victims of the war, especially children'.<sup>4</sup>

Since it began in 1986, at least 30,000 people have been killed and around 2 million are internally displaced. What is worth noting about this 25-year long war is not merely about the civilian population being affected through collateral damage, but 'it is a war targeting the civilian population, and especially children'.<sup>5</sup> Civilians in the affected areas remain vulnerable to continuous violence and insecurity including abductions, killings and maimings by LRA, abuses by Ugandan government military forces sent to fight the rebel groups and disease and social disintegration in 'protected camps/ villages' established by the government of Uganda (GOU) as the strategy policy of its counter-insurgency.<sup>6</sup>

Yet, with the Ugandan government failing in many accounts in its responsibility to protect its civilians, the most significant international response to the Ugandan humanitarian crisis has come from the International Criminal Court. The response to the protection needs of civilians, on the other hand, has been wholly inadequate. Despite international judicial intervention was justified in stopping the ongoing LRA atrocities, I argue that the international society's preoccupation with punishing LRA leadership and preventing future conflicts through deterrence and its lesser concern with protecting northern Ugandan civilians reflects an inherent tension between R2P protection and ICC punishment in northern Uganda.

This chapter starts with a brief sketch of the historical background to the emergence of Joseph Kony and the Lord's Resistance Army. The chapter then looks at the international response to the atrocities and large-scale loss of life committed by the LRA and the long-term failure of the Ugandan government in its responsibility to protect its civilians. This is followed by an analysis of the underlying tension between ICC judicial intervention and impending R2P action in international society's attempt to punish perpetrators and protect civilians in this twenty-five year old conflict in northern Uganda.

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*Reconstruction and Reconciliation in Rwanda and Beyond* (New York: Columbia University Press, 2009), p. 333-350.

<sup>3</sup> 'War in northern Uganda world's worst forgotten crisis: UN', *Agence France Presse*, 11 November 2003.

<sup>4</sup> Uganda conflict 'worse than Iraq', *BBC News*, 10 November 2003.

<sup>5</sup> Ibid.

<sup>6</sup> Mary Page, 'Dealing with Atrocities in Northern Uganda', in Richard Cooper & Juliette Kohler (eds.) *Responsibility to Protect: The Global Moral Compact for the 21<sup>st</sup> Century* (New York: Palgrave, 2009), p. 129.

### **Background and history of the conflict in northern Uganda**

The roots of the conflict in northern Uganda can be traced back to the period of British colonial rule. Yet, understanding this twenty-five year old conflict relies on two crucial characteristics: the widening gap between north and south, and the militarization of politics.<sup>7</sup> As such, the current conflict has to be seen against the background of the strong military character of every post-colonial regime in Uganda. The customary practice of seeking to access power through waging armed rebellions has left a legacy of violence, militarism and impunity in Ugandan politics as well as deep-rooted divisions between the north and south of the country.<sup>8</sup> The ethnic dimension of this north-south divide, which was introduced during the British rule and consolidated since independence, can be understood in terms of economic development and systems of labour recruitment: whereas industry and cash crop production were reserved for the Bantu-speaking groups in the south, the Nilotic-speaking groups in the north were regarded simply as a reservoir of cheap labour to be employed in the south.<sup>9</sup>

Museveni's National Resistance Army's seizure of power in 1986 was significant because 'for the first time, socio-economic, political and military powers were all concentrated in the south'.<sup>10</sup> But perhaps not surprisingly, the conflict in Acholiland erupted soon after Uganda's last regime change because of Museveni's attempt to consolidate control over the northern parts of the country. Since independence, Uganda had been ruled by people from the North for most of the time except the period of Idi Amin's rule between 1971 and 1979 as Amin himself came from north-western Uganda.<sup>11</sup> Therefore, Museveni's coming into power after a five-year guerrilla war made it imperative for the Acholi people to regain their power in Uganda. This explains a key feature of the rebellions in Uganda since 1986: almost all of them emerged from the North, in particular the Acholi people, since Yoweri Museveni, a southerner, came into power in that year.<sup>12</sup>

#### *Joseph Kony and the emergence of the Lord's Resistance Army*

It is in this context that Joseph Kony found what would become known as the Lord's Resistance Army in 1987. From its inception, Kony's LRA was the only effective military group at the time to represent the Acholi against the new Museveni government for depriving themselves of political, military and economic power. In essence, LRA fighters are motivated by their firm belief that they are fighting for a divine cause which God directs and guides through his prophet Kony.<sup>13</sup> The combatants are convinced that they have 'found

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<sup>7</sup> Ruddy Doom & Koen Vlassenroot, 'Kony's message: a new *koine*? The Lord's resistance army in northern Uganda', *African Affairs* (1999), 98: p. 7.

<sup>8</sup> Zachary Lomo & Lucy Hovil 'Behind the violence: the war in Northern Uganda', *ISS Monograph* No. 99, March 2004, p. 14-21.

<sup>9</sup> Ruddy Doom & Koen Vlassenroot, 'Kony's message: a new *koine*?', p. 7-9.

<sup>10</sup> Catherine Barnes & Okello Lucima, 'Introduction', *Accord: Protracted conflict, elusive peace*, (London: Conciliation Resources, 2002), p. 12.

<sup>11</sup> Kasaija Apuuli, 'Amnesty and International Law: The case of the Lord's Resistance Army insurgents in Northern Uganda', *African Journal on Conflict Resolution*, 5 (2), p. 33-62.

<sup>12</sup> Frank Van Acker, 'Uganda and the Lord's Resistance Army: the new order no one ordered', *African Affairs*, 103, (412), p. 335-357.

<sup>13</sup> Balam Nyeko & Okello Lucima, 'Profiles of the parties to the conflict', *Accord: Protracted conflict, elusive peace*, (London: Conciliation Resources, 2002), p. 18.

faith in the Lord God as their main inspiration for continued resistance'.<sup>14</sup> According to Kony himself, the aim of his movement is to overthrow Museveni regime and rule Uganda according to the Ten Commandments.<sup>15</sup> Thus, by exercising absolute control over his fighters and the insurgency's overall strategy, Joseph Kony is central to the organisation, actions and its very purpose.

Yet, notwithstanding its claim to represent the historical Acholi grievances, Kony's rebel movement soon distinguished itself by not only its extreme millennial beliefs but also its excessively violent methods.<sup>16</sup> Rather than aiming at the Ugandan army, the LRA, whose 95% fighters are Acholi, has concentrated its violence against the Acholi people, whom they claim to be fighting for.<sup>17</sup> This anti-civilian violence is at odds with its appeal that the rebel movement is a legitimate champion of Acholi grievances.<sup>18</sup> As a result, Kony's popular support among the Acholi had quickly evaporated as the vast majority of Acholi people rejected the LRA as their representative.

Thus, even though it is focused on discrediting the Museveni government, it does not change the fact that the LRA has never intended to engage civilians seriously in political mobilisation. In retrospect, the period of the early/mid-1990s proved to be a major turning point in the transformation of the LRA. The first major transformation occurred in 1994 when the LRA-NRM peace process that had been championed by the government minister Betty Bigombe collapsed. Although Bigombe had established a reputation as a trustworthy negotiator for the two sides, the LRA remained sceptical about the overall intentions of the Museveni government after months of negotiations. To make things worse, Museveni issued a seven-day ultimatum to Kony that he had to come out of the bush and surrender or would be annihilated. Kony, in response, flatly rejected the ultimatum and the first group of LRA fighters crossed the border by establishing bases in southern Sudan.<sup>19</sup>

The second major transformation took place when the Sudanese government has become the LRA's only known supporter.<sup>20</sup> The Sudan factor has come into play after the failure of the peace talks.<sup>21</sup> From 1994 Sudan began providing logistical and military support to the LRA in retaliation for Uganda's support of the Sudan People's Liberation Army (SPLA), the southern Sudanese rebellion against the Khartoum authorities. Strategically, the Sudanese government has found the LRA's fighting ability valuable for countering its own insurgency in southern Sudan and the latter's main supporter in Uganda.<sup>22</sup> By supplying the LRA with money, arms and bases, it helped the Sudanese government to both destabilise

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<sup>14</sup> Ibid., p. 18.

<sup>15</sup> Ruddy Doom & Koen Vlassenroot, p. 8.

<sup>16</sup> Heloise Ruadel & Andrew Timpson, 'Northern Uganda—from a forgotten war to an unforgivable crisis—the war against children', *Situation Report*, Institute for Security Studies, 12 December 2005, p. 4.

<sup>17</sup> Adam Branch, 'Neither Peace nor Justice: Political Violence and the Peasantry in Northern Uganda, 1986-1998', *African Studies Quarterly*, Volume 8, Issue 2, p. 4.

<sup>18</sup> International Crisis Group, 'Northern Uganda', p. 9.

<sup>19</sup> Billie O'Kadameri, 'LRA and Government negotiations 1993-1994', *Accord: Protracted conflict, elusive peace*, (London: Conciliation Resources, 2002), p. 41.

<sup>20</sup> Kevin Dunn, 'The Lord's Resistance Army and African International Relations', p. 48.

<sup>21</sup> Adam Branch, 'Neither Peace nor Justice', p. 18.

<sup>22</sup> International Crisis Group, 'Northern Uganda', p. 7.

Uganda and stop arms flow to the SPLA.<sup>23</sup> Therefore, in effect, Sudanese support has added a regional dimension to what is seen as an internal armed conflict within Uganda.

#### *LRA atrocities and anti-civilian violence*

It is increasingly clear that the conflict in northern Uganda is characterised by the brutality and apparent arbitrariness of LRA violence.<sup>24</sup> Throughout the two decades of its insurgency, civilian populations have been made the target of most of the LRA's activity. But it was particularly since 1994 that the LRA had begun engaging in a systematic campaign of attacks on civilian targets.<sup>25</sup> In an attempt to terrorise the civilian population and forcing them into submission, throughout the years the LRA has burnt villages, attacked schools and hospitals, mutilated and maimed civilians by cutting off lips, ears and nose as well as chopping hands.<sup>26</sup> In this sense, 'what began in 1986 as a guerrilla struggle for political inclusion became over the years a predatory, terrorist subjugation of the people in whose name the struggle had begun'.<sup>27</sup>

In addition, the LRA's direct engagement in fighting the SPLA on behalf of the Sudanese government and its continual struggle against the Museveni regime necessitate a much larger armed force. But the LRA's little enthusiasm for (as well as difficulty in) mobilising popular support made it necessary for Kony to turn to the practice of children recruitment. As a result, apart from terrorising the population through mutilation and murder, the LRA became associated with forced recruitment, or in other words, abductions of children. Here it is worth noting that the abduction of children has been a deliberate strategy—by reinforcing the production of terror and replenishing the rebel's ranks with fresh fighters.<sup>28</sup> Although the scale of abduction, as Tim Allen points out, is a matter of speculation due to insufficient monitoring, it is estimated that between 30,000 and 45,000 children have been abducted for use as soldiers, porters, slaves and even 'wives' of commanders.<sup>29</sup> In order to separate them from the broader community by binding them to the LRA, these children are often required to perform atrocities against their own communities and even their own families.

Thus, although Kony's force may have begun its revolt against the Museveni government in instrumental terms, such as to establish a regime in Uganda based on the Christian Ten commandments, the motivation of the LRA has become existential in nature—the perpetuation of the LRA as an organisation.<sup>30</sup> In this sense, violence has become both a

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<sup>23</sup> Refugee Law Project (RLP), 'Behind the Violence: Causes, Consequences, and the Search for Solutions to the War in Northern Uganda', Working Paper 11, February 2004: 18,

<sup>24</sup> Ruddy Doom & Koen Vlassenroot, 'Kony's message: a new *koine*?', p. 5.

<sup>25</sup> CSOPNU, 'Nowhere to hide', p. 52.

<sup>26</sup> Amnesty International, 'Uganda: Child "Night Commuters"', 18 November 2005. Available at <<http://www.amnesty.org/en/library/asset/AFR59/013/2005/en/ef37fb59-d492-11dd-8a23-d58a49c0d652/afr590132005en.pdf>>

<sup>27</sup> Adam Branch, 'International Justice, Local Injustice', *Dissent* (Summer): 22-28.

<sup>28</sup> CSOPNU, 'Nowhere to hide', p. 5.

<sup>29</sup> Tim Allen, 'War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention' (London: Crisis States Research Centre, Development Studies Institute, London School of Economics, Feb 2005).

<sup>30</sup> Anthony Vinci, 'Existential Motivations in the Lord's Resistance Army's Continuing Conflict', *Studies in Conflict & Terrorism*, 30: 337-352, 2007.

tool and an end in itself because the purpose of Kony's force is no longer in winning a conflict but the indefinite continuance of war.<sup>31</sup>

### **Government response and its failure of the responsibility to protect**

Since capturing power in 1986, Museveni's strategy of political consolidation in the south has stood in stark contrast to the north. While reconstructing economy and stabilising politics in the south, Museveni's grand strategy in the north is characterised by the military capacity to defeat or cripple armed insurgents.<sup>32</sup> The search for a military victory over the LRA has consistently been the dominant response.<sup>33</sup> As such, six separate military offensives have been launched attempting to eradicate the LRA since 1986, including Operation North (1991), Operation Iron Fist (2002), Operation Iron Fist II (2004) and Operation Lightning Thunder (2008-9).<sup>34</sup>

#### *Failed military response and abortive peace negotiations*

Museveni's preoccupation of a military solution was in many ways shaped by his personal ideological predisposition to militarism and, more importantly, his disdain for negotiating 'thugs' and 'criminals' within the LRA.<sup>35</sup> In 2004, for example, while offering to negotiate with the rebels, Museveni has maintained a hard line by saying that 'the day and night operations aimed at wiping out the terrorists will be continued and will be intensified until every terrorist leader has been accounted for or until the remnants of the terrorists come out from their crime-laden way of existence'.<sup>36</sup> Similarly, in rejecting Jan Egeland's suggestion of going into the jungle to talk to Joseph Kony, the Ugandan president tried to downplay the significance of the peace talks, stating that 'there would only be a military solution' to the LRA problem.<sup>37</sup>

Given that Museveni has had an 'impressive' record in defeating militarily or appeasing diplomatically some 20 armed groups since 1986, the president has generally displayed little appetite for ending the northern conflict through peace agreement. Except for the period from 2006-2008 Juba talks, the Ugandan government made only two formal attempts at peace negotiation with the LRA in 1994 and 2003 respectively. Perhaps not surprisingly, both the peace processes were sabotaged largely by Museveni: while Museveni's seven-day ultimatum had led to the breakdown of negotiation between Betty Bigombe and Joseph Kony in 1994, Museveni's decision to end the ceasefire unilaterally because of his mistrust of the LRA had made the peace talks initiated by the Acholi Religious Leaders Peace Initiative (ARLPI) collapsed.

#### *Forced Displacement and the 'protected villages'*

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<sup>31</sup> Ruddy Doom & Koen Vlassenroot, 'Kony's message: a new *koine*?', p. 26.

<sup>32</sup> Andrew Mwenda, 'Uganda's politics of foreign aid and violent conflict: the political uses of the LRA rebellion', p. 53.

<sup>33</sup> CSOPNU, 'Nowhere to hide', p. 30.

<sup>34</sup> Phuong Pham (*et al*), 'When The War Ends: Peace, Justice, and Social Reconstruction in Northern Uganda', (UC Berkeley's Human Rights Center & Tulane's Payson Center for International Development), December 2007, p. 15.

<sup>35</sup> Andrew Mwenda, 'Uganda's politics of foreign aid and violent conflict: the political uses of the LRA rebellion', p. 50-51.

<sup>36</sup> 'Uganda: Museveni offers to negotiate with LRA rebels', *IRIN News*, 16 April, 2004. <http://www.irinnews.org/report.aspx?reportid=49543>

<sup>37</sup> Jan Egeland, *A Billion Lives: An Eyewitness Report from the Frontlines of Humanity* (New York: Simon & Schuster, 2008), p. 197-214.

To be sure, Museveni's strong preference for a military solution to the LRA problem has proved unsuccessful as this rebel group has been in existence for more than two decades and responsible for Africa's longest running armed conflict.<sup>38</sup> It was after about ten years of the conflict that the Ugandan government started implementing a policy of long-term forced displacement of the Acholi population. The rationale for this 1996 decision is threefold:<sup>39</sup> (a) putting them in single locations near to army detachments is the most effective strategy for providing the populace protection since the government is not able to protect civilians in their own villages; (b) by separating the civilian population from the rebels it helps reduce the LRA's ability to recruit civilian collaborators; (c) removing civilians from the field clears the territory for unimpeded military operations.

Named euphemistically as 'protected villages', these are internment camps for internally displaced people (IDPs) because of the constant use of government violence to keep civilians from leaving.<sup>40</sup> As such, while some IDPs moved to camps spontaneously, the majority of displacement had been the consequence of government coercion through a 'campaign of murder, intimidation, and the bombing and burning of entire villages'.<sup>41</sup> Any civilians found outside of the camps, as the renamed official army Ugandan People's Defence Force (UPDF) proclaimed, would be 'considered a rebel and killed'.<sup>42</sup>

The government's decision to force the Acholi population into 'protected villages', somewhat ironically, has failed to provide security for them because of the lack of protection provided by the UPDF to the camps. Soldiers were often positioned in the middle of IDP camps, making them bear the brunt of LRA attacks and abductions.<sup>43</sup> People in the overcrowded camps were not provided with sufficient food, water and sanitation, and subsequently 'up to 1000 people died there each week from treatable illnesses like malaria and diarrhoea'.<sup>44</sup> In this sense, a government policy of 'protected villages' without providing proper protection has adversely turned the displaced people into easy targets for the LRA.

Thus, the Museveni government's failed military solution to eradicate the LRA and its policy of 'forced displacement' have resulted in 'a population suffering serious harm as a result of internal insurgency with the state in question unwilling or unable to halt or avert it'.<sup>45</sup> Given that civilians in northern Uganda are extremely vulnerable to LRA attacks and human rights abuses by the government, the Ugandan state has failed its responsibility to protect its citizens living in the Acholiland from physical harm and human rights abuses.

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<sup>38</sup> Ledio Cakaj, 'The Lord's Resistance Army of Today', November 2010, *The Enough Project*, p. 1.

<sup>39</sup> CSOPNU, 'Nowhere to hide', p. 60.

<sup>40</sup> Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention', *Ethics and International Affairs* 21: 181.

<sup>41</sup> *Ibid.*, p. 181.

<sup>42</sup> *Ibid.*, p. 181.

<sup>43</sup> Ruth Mukwana & Katinka Ridderbos, 'Uganda's response to displacement: contrasting policy and practice', *Forced Migration Review*, December 2008, p. 21.

<sup>44</sup> UN IRIN, 'Uganda: 1000 Displaced Die Every Week in War-torn North', August 29, 2005; Louise Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?', Working paper from Beyond Legalism: Amnesty, Transition and Conflict Transformation project, (Institute of Criminology and Criminal Justice, Queen's University Belfast 2009), p. 12.

<sup>45</sup> International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, at XI (December 2001).

### **The response of the international community: internationalising a ‘forgotten conflict’?**

Yet, even being faced with such a critical situation, where at its peak about 2 million people were internally displaced and where more than 1000 people died each week, ‘the passivity of the international community’ to this humanitarian emergency is enigmatic.<sup>46</sup> It is not an exaggeration to say that this twenty-five year old conflict had been ‘forgotten’ because ‘the international community’, as Sandrine Perrot suggested, had ‘turned a blind eye to the northern Ugandan conflict for over fifteen years’.<sup>47</sup> In many ways, the visit of the UN Under-Secretary-General Humanitarian Affairs and Emergency Relief Coordinator Jan Egeland in November 2003 was then a turning point in the role of the international community in northern Uganda. Jan’s assertion that northern Uganda as ‘the biggest forgotten, neglected humanitarian emergency in the world today’, as mentioned above, has made the situation in northern Uganda ‘from being a “forgotten conflict” to being highly visible and a centre of attention for the international community’.<sup>48</sup>

Indeed, despite the gravity and notoriety of LRA abuses in northern Uganda and the longevity of the conflict, the international community had not been inclined to pressure Sudan—the LRA’s only known supporter—to stop harbouring the organisation. Rather, the burden has largely been placed on the Ugandan government to either negotiate a peaceful settlement with the LRA or pursue an amnesty approach by encouraging defections of LRA combatants,<sup>49</sup> demonstrating international reluctance to become involved in terms of protection for civilians.

Apart from realist calculations—insufficient vital national interests at stake for countries capable of intervening, the international community’s lack of enthusiasm to protect civilians in the conflict was caused by Uganda’s economic and institutional success and, somewhat ironically, the brutal nature of LRA atrocities. Despite its heavy dependence on foreign aid, Uganda’s experience of post conflict reconstruction, structural adjustment and economic liberalization has been widely hailed by the World Bank as an African success story.<sup>50</sup> The northern conflict was then ‘left in the shadow of the pacification and state rebuilding model Uganda had developed in the rest of the territory since the beginning of the 1990s’.<sup>51</sup> At the same time, the extra-moral violence used by the LRA, Kony’s mix of

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<sup>46</sup> UN Security Council, S/PV.5331 (19 December 2005), p. 6; Payam Akhavan, ‘Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism’, *Human Rights Quarterly* 31(2009), p. 642.

<sup>47</sup> Sandrine Perrot, ‘Northern Uganda: a “forgotten conflict” again? The impact of the internationalization of the resolution process’, in Tim Allen & Koen Vlassenroot (eds.) *The Lord’s Resistance Army: Myth and reality* (London: Zed Books, 2010), p. 187.

<sup>48</sup> ‘War in northern Uganda world’s worst forgotten crisis: UN’, Agence France Presse, 11 November 2003; Chris Dolan, ‘Peace and conflict in northern Uganda 2002-06’, in *Accord: Initiatives to end the violence in northern Uganda, a supplement to Protracted conflict, elusive peace*, (London: Conciliation Resources, 2010), p. 8.

<sup>49</sup> The government introduced a new Amnesty Act in January 2000, purporting to grant immunity to the LRA leadership and offer assistance for the demobilization and reintegration of the LRA rebels into Ugandan society. See Payam Akhavan, ‘The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court’, 99 *American Journal of International Law* 403-4 (2005).

<sup>50</sup> Roger Tangri & Andrew Mwenda, ‘Corruption and cronyism in Uganda’s privatization in the 1990s’, *African Affairs* (2001), 100 (398): 117-133.

<sup>51</sup> Sandrine Perrot, ‘Northern Uganda: a “forgotten conflict” again? The impact of the internationalization of the resolution process’, p. 188.



biblical ideology and messianic form of terror as well as the absence of a clearly articulated political agenda appeared to be consistent with the Western-scripted *Heart of Darkness* paradigm because of their deviance from the Western rationality of warfare.<sup>52</sup> In other words, the insanity thesis had partly obscured the complexity of the conflict, as the northern Uganda war 'used to be considered as localised and residual violence'.<sup>53</sup>

The northern conflict has undeniably blemished the record of the Museveni government which was internationally credited for the country's economic and institutional success, but LRA abductions and brutality has indirectly strengthened the 'victim' image of the Ugandan government as it helps promote a simplistic, black-and-white view of the war as essentially "good" (the Ugandan government and army) versus "evil" (the LRA).<sup>54</sup> The war, argues Andrew Mwenda, has served an important function for the Ugandan government both domestically and internationally:

Domestically, President Museveni, for example, has used this dominant narrative/official discourse of the war to sow fear and cultivate political support from areas outside northern Uganda. Internationally, he has used the war, and the official discourse of it, to help obtain diplomatic and budgetary support from the World Bank, the US, and other donors, both in general and for the military in particular.<sup>55</sup>

Yet, while the 'fanatical and murderous cult' has brought international sympathy for the Museveni government, it is important not to lose sight of the fact that the constant military and financial support from the 'Quartet' nations and donors<sup>56</sup> has come against the backdrop of the international community's perception of the northern conflict as 'localized and residual violence', or simply as an 'Acholi problem'.<sup>57</sup> This is evidenced by the nature of the debate about defence spending between Museveni and the bilateral donors since 1992: whether increasing military spending and procurement of military supplies could lead to increased effectiveness of the military in countering insurgents.<sup>58</sup> Rather than questioning Kampala's military solution to resolving the conflict in the north, the debate was framed on the budgetary aspects of the war.<sup>59</sup>

Museveni's hardline position on dealing with the northern conflict was given indirect endorsement by the US when the Lord's Resistance Army was proscribed as a terrorist organisation in the 'USA Patriot Act Terrorist Exclusion List' in late 2001.<sup>60</sup> Even though the government has pursued a military solution unsuccessfully over the years, the global war on terror after 9/11 has given a fresh impetus to Museveni's militarization of LRA policy. Just one year the US State Department added the LRA to its terrorist watch list, the parliament

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<sup>52</sup> Kevin Dunn, 'Killing For Christ?—The Lord's Resistance Army of Uganda', *Current History* 103 (May 2004), p. 208.

<sup>53</sup> *Ibid.*, p. 208; Sandrine Perrot, 'Northern Uganda: a "forgotten conflict" again? The impact of the internationalization of the resolution process',

<sup>54</sup> Ronald Atkinson, 'From Uganda to the Congo and Beyond', p. 10.

<sup>55</sup> Quoted in Ronald Atkinson, 'From Uganda to the Congo and Beyond', p. 9.

<sup>56</sup> The informal 'Quartet' of concerned countries in Kampala is the US, UK, Norway and the Netherlands. See ICG, *A Strategy for Ending Northern Uganda's Crisis*, Africa Briefing No. 35, p. 1.

<sup>57</sup> Catherine Barnes & Okello Lucima, 'Introduction', *Accord: Protracted conflict, elusive peace*, p. 6.

<sup>58</sup> Andrew Mwenda, 'Uganda's politics of foreign aid and violent conflict: the political uses of the LRA rebellion', p. 50.

<sup>59</sup> *Ibid.*, p. 50.

<sup>60</sup> 'Uganda: LRA, ADF on American terrorist list', *IRIN Africa*, 7 December 2001.

of Uganda passed the Anti-Terrorism Act (ATA) in 2002, making membership of the LRA a criminal offense.<sup>61</sup> Following the 1999 Nairobi Agreement between Uganda and Sudan,<sup>62</sup> Uganda collaborated with her once 'cold and distant neighbour' Sudan on launching a military offensive 'Operation Iron Fist' in southern Sudan in March 2002, the first major military operation since Operation North in 1991.<sup>63</sup> With the involvement of an estimated 10,000 Ugandan troops, LRA rear bases in Sudan were destroyed but Joseph Kony and almost all of his senior commanders evaded capture.<sup>64</sup> Even the LRA's fighting ability was significantly weakened, they were able to revolutionise their tactics by becoming even more mobile.<sup>65</sup>

Perhaps more devastatingly, instead of making northern Uganda safer for civilians, this 2002 military offensive caused a radicalized reaction of the LRA as it led to the return of LRA fighters to northern Uganda. This had increased both the numbers of attacks and abductions of children on a scale and of a brutality not seen since the mid 1990s, resulting in widespread displacement and suffering in regions previously not affected.<sup>66</sup>

Operation Iron Fist, therefore, was nothing but a failure if its aim was to resolve the situation once and for all. This major military operation targeting since 1991 has resulted only in more LRA retaliatory attacks on civilians in both northern Uganda and southern Sudan. Indeed, it is the humanitarian crisis provoked by this military offensive that prompted Jan Egeland's visit in late 2003, thus shedding new light on the conflict.<sup>67</sup> Since giving his first briefing to the UN Security Council on the situation in northern Uganda in April 2004,<sup>68</sup> Jan Egeland had then pushed for his briefings to be presented before the UN Security Council on a regular basis.

In any case, Jan Egeland's efforts to place the issue on the UN agenda have raised the alarm of the seriousness of this once 'localised and residual violence'. In particular, the Council expressed its concern about the large-scale displacement of the civilian population, the abduction of children and their forced recruitment as soldiers. While demanding the LRA to immediately cease all acts of violence against civilians, the Council also called for the Ugandan government to enhance its protection for displaced persons and those providing essential services to them.<sup>69</sup>

#### *ICC intervention and increased international attention*

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<sup>61</sup> Chris Dolan, 'Peace and conflict in northern Uganda 2002-06', in *Accord: Initiatives to end the violence in northern Uganda 2002-2009 and the Juba Peace Process*. (London: Conciliation Resources, 2010), p. 8.

<sup>62</sup> The stated intent of the agreement, which was brokered by former US President Jimmy Carter, was to 'provide the critical impetus for resolving the northern Uganda conflict'. See Agreement between the Governments of Sudan and Uganda, 8 December 1999.

<sup>63</sup> 'Uganda and Sudan join hands to fight LRA',

<sup>64</sup> Tim Allen, *Trial Justice*, p. 51.

<sup>65</sup> Anthony Vinci, 'The Strategic Use of Fear by the Lord's Resistance Army', *Small Wars & Insurgencies*, 16 (2005): 367.

<sup>66</sup> Refugee Law Project (RLP), 'Behind the Violence: Causes, Consequences, and the Search for Solutions to the War in Northern Uganda', p. 32.

<sup>67</sup> Sandrine Perrot, 'Northern Uganda: a "forgotten conflict" again? The impact of the internationalization of the resolution process', p. 188.

<sup>68</sup> UN urges end to Ugandan "horror", *BBC News*, 22 October 2004, available at <<http://news.bbc.co.uk/2/hi/africa/3943677.stm>>

<sup>69</sup> UN Press Release SC/ 8057 AFR/900, *Press Statement on Northern Uganda by Security Council President*, 14 April 2004.

But the fact that a deployment of a UN peace operation in northern Uganda has never been seriously considered is a clear demonstration of ‘talk the talk, but not walk the walk.’<sup>70</sup> While Jan Egeland’s 2003 visit has largely been successful in generating international media attention in the northern conflict, it is the 2004 decision by the International Criminal Court (ICC) to investigate the situation of the LRA that raised international awareness of mass atrocities being committed in the Acholiland.

Significantly, the International Criminal Court commenced a formal investigation in northern Uganda in July 2004 following a self-referral by the Government of Uganda. On 16 December, 2003, President Museveni sent a confidential letter to the ICC Prosecutor Luis Moreno-Ocampo referring to the Court ‘the situation concerning the LRA in northern and western Uganda’.<sup>71</sup> Museveni’s referral of the situation was the first time for a state party to invoke Article 14 of the Rome Statute by vesting the ICC with jurisdiction.<sup>72</sup> Determining that there was ‘a reasonable basis to open an investigation into the situation concerning Northern Uganda’, the ICC Prosecutor held a joint press conference in London on 29 January 2004 with the Ugandan President to announce the referral.<sup>73</sup>

On 6 May 2005, the Office of the Prosecutor (OTP) applied to Pre-Trial Chamber II for arrest warrants for the LRA leader Joseph Kony, his deputy Vincent Otti, and against other three senior LRA commanders Raska Lukwiya, Okot Odhiambo and Dominic Ongwen.<sup>74</sup> On 8 July 2005, the Pre-Trial Chamber issued arrest warrants under seal so that further steps for victim and witness protection could be taken.<sup>75</sup> Thus, from July until October 2005, teams from the Registry and OTP made trips to Uganda to develop protection schemes for witnesses and victims.<sup>76</sup> On 13 October 2005, the ICC unsealed the warrants. The warrants referred to crimes against humanity and war crimes committed in Uganda since July 2002. In particular, the warrant against Joseph Kony listed 33 counts of crime against humanity and war crimes, including murder, sexual enslavement, rape and forced enlisting of children.<sup>77</sup> But so far, none of the suspects are in custody.

Here, the most interesting aspect of the ICC intervention in northern Uganda is that while Museveni had tried hard to downplay the northern conflict as ‘localized and residual violence’ for a long period of time, his request for the Court’s assistance with the

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<sup>70</sup> Sandrine Perrot, ‘Northern Uganda: a “forgotten conflict” again? The impact of the internationalization of the resolution process’, p. 195.

<sup>71</sup> ICC, Presidency, Letter from Chief Prosecutor Moreno Ocampo to President Kirsch, ICC-02/04-1 06-07-2004, appendix to “Decision Assigning the Situation in Uganda to Pre-Trial Chamber II” (2004), 4.

<sup>72</sup> Payam Akhavan, ‘The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court’ (2005) 99 *American Journal of International Law* 403-421.

<sup>73</sup> ICC Press Release, President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC (Jan 29, 2004).

<sup>74</sup> ICC, PTC II, “Decision on the Prosecution’s Application for Warrants of Arrest Under Article 58’ (2005).

<sup>75</sup> Office of the Prosecutor of the ICC, Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58, 8 July 2005, No. ICC-02/04-01/05-1-US-Exp 12-07-2005 2/11 UM, unsealed pursuant to Decision No. ICC-02/04-01/05-52, 13 October 2005, available at <[www.icc-cpi.int/icdocs/doc/doc97108.pdf](http://www.icc-cpi.int/icdocs/doc/doc97108.pdf)>

<sup>76</sup> Benjamin Schiff, *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008), p. 205.

<sup>77</sup> See Amnesty International, ‘Uganda: Arrest Now! Uganda: Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen’ (28 November 2007). AI Index: AFR 59/008/2007.

apprehension and prosecution of the LRA leadership has made Uganda the ICC's first situation country. In explaining its motivation for the referral, the Ugandan government argued:

Despite repeated Ugandan attempts at peaceful settlement and reconciliation, the LRA has refused to end its campaign of terror...Having exhausted every other means of bringing an end to this terrible suffering, the Republic of Uganda now turns to the newly established ICC and its promise of global justice. Uganda pledges its full cooperation to the Prosecutor in the investigation and prosecution of LRA crimes, achievement of which is vital not only for the future progress of the nation, but also for the suppression of the most serious crimes of concern to the international community as a whole.<sup>78</sup>

Even self-referrals by state parties were not anticipated during the Rome Conference,<sup>79</sup> the voluntary referral to the ICC by the government of Uganda of the situation was encouraging to many supporters of the Court. 'The voluntary referral of a compelling case (LRA) by a state party', as Payam Akhavan argued, 'represented both an early expression of confidence in the mandate and a welcome opportunity to demonstrate its viability'.<sup>80</sup> In response to the issuing of ICC's first-ever arrest warrants, UN Secretary-General of the time Kofi Annan stated that the unsealed warrants should 'send a powerful signal around the world that those responsible for such crimes will be held accountable for their actions'.<sup>81</sup> But perhaps more significant is that it was part of the attempt by Uganda to 'engage an otherwise aloof international community by transforming the prosecution of LRA leaders into a litmus test for the much celebrated promise of global justice'.<sup>82</sup> As Richard Cooper and Juliette Kohler pointed out:

With a domestic government failing in many accounts in its responsibility to protect and an international community less than eager to bypass President Museveni's objections to intervention, the most significant response to the Ugandan humanitarian crisis has come from the ICC.<sup>83</sup>

Apart from the ICC judicial intervention since 2004, it is astonishing that the Council did not take up the situation in northern Uganda until the conflict entered its 20<sup>th</sup> year in January 2006. A 2006 United Nations Security Council (UNSC) report revealed that while the regional nature of the LRA threat has been the Council's primary concern, the inclusion of northern Uganda in the Council's agenda on humanitarian grounds has faced reluctance from some Council members.<sup>84</sup> This is largely attributed to Uganda's firm resistance of Council involvement in the humanitarian situation within the country, which it sees as a

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<sup>78</sup> Government of Uganda, 'Referral of the Situation Concerning the Lord's Resistance Army', Kampala, December 2003, para. 5-6.

<sup>79</sup> Jennifer Llewellyn & Sandra Raponi, 'The Protection of Human Rights through International Criminal Law: A Conversation with Madame Justice Louie Arbour, Chief Prosecutor for the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (1999) 357 (1) University of Toronto Faculty of Law Review 83, at 97.

<sup>80</sup> Payam Akhavan, 'The Lord's Resistance Army Case', p. 403.

<sup>81</sup> 'Annan hails International Criminal Court's arrest warrants for five Ugandan rebels', UN News Service, 14 October 2005.

<sup>82</sup> Payam Akhavan, 'The Lord's Resistance Army Case', p. 403.

<sup>83</sup> Richard H. Cooper & Juliette Voïnov Kohler (eds.) *Responsibility to Protect: The global Moral Compact for the 21<sup>st</sup> Century* (New York: Palgrave Macmillan, 2008), p. 8-9.

<sup>84</sup> Security Council Report, Uganda, 18 April 2006.

purely internal matter.<sup>85</sup> As a result, Uganda has actually never been under strong international pressure because of its failure of responsibility to protect the civilian population.

### **When ICC precedes R2P: punishment first and protection later?**

Clearly, Uganda prior to ICC judicial intervention could be regarded as a case of 'non-intervention', despite the significant brutality of LRA abuses. Most attention has been focused on the responsibility to punish in terms of the international community's response to the Ugandan northern conflict. In this context, if Uganda's self referral of the situation, assumingly, was its attempt to 'engage an otherwise aloof international community', it is hard to deny that the ICC judicial intervention, apart from internationalizing this 'localized and residual violence', has not been effective in stopping atrocities and loss of life in the country.

As a result, ICC judicial intervention in northern Uganda has disguised an important underlying fact: 'the conflict has received far too little attention and the response to the protection needs of civilians has been wholly inadequate'.<sup>86</sup> While responsibility to protect civilians in northern Uganda rests primarily with the Ugandan government, it has constantly demonstrated its failure to protect IDPs in the 'protected villages' from LRA attacks and even its own troops from abusing civilians.<sup>87</sup> Perhaps not surprisingly, the issuing of the arrest warrants initially provoked more LRA attacks on international relief groups and foreigners.<sup>88</sup> This has been portrayed by the International Crisis Group as 'collective failure' of the Ugandan government and international community: almost nothing has been done domestically and internationally in terms of protection of civilians prior to publication of the ICC warrants.<sup>89</sup>

If the gravity and notoriety of LRA abuses in northern Uganda represented the type of exceptional situation that justified international judicial intervention,<sup>90</sup> it does not stand to the reason why international R2P action should not be invoked. As such, the fact that the ICC has constituted the most significant international response to the Ugandan humanitarian crisis needs explanation: what prism do international policymakers apply in response to large-scale atrocities in northern Uganda? In fact, the overriding policy issue for international policymakers seems to be whether the important prospect of punishing LRA leadership and preventing future conflicts through deterrence takes precedence over more immediate imperative of protecting northern Ugandan civilians from mass murder in this 25<sup>th</sup> year ongoing conflict.

In this sense, there is a real tension between R2P protection and ICC punishment in northern Uganda. This highlights the problem of timing and sequencing in international R2P and ICC actions in stopping the mass atrocities in northern Uganda. Thus, in understanding when and how the international engagement seeking to respond to mass atrocities in

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<sup>85</sup> Ibid.

<sup>86</sup> InterAction's Protection working group, 'Fulfilling the Forgotten Promise: The Protection of Civilians in Northern Uganda', January 2006, p. 7.

<sup>87</sup> ICG, *A Strategy for Ending Northern Uganda's Crisis*, Africa Briefing No. 35, p. 3.

<sup>88</sup> Sverker Finnstrom, 'Wars of the Past and War in the Present: The Lord's Resistance Movement/Army in Uganda', (2006) 76 *Africa* 200, 200.

<sup>89</sup> ICG, *A Strategy for Ending Northern Uganda's Crisis*, Africa Briefing No. 35, p. 3.

<sup>90</sup> Payam Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court', p. 404.

northern Uganda and where the tension lies, the focus must be on different temporal orderings of R2P-ICC linkages.

*Upholding Justice as Providing Protection in northern Uganda? Conflicting timeframe*

As was noted earlier, ICC has been invoked as the most dominant response from the international community. Rather than applying R2P to the humanitarian crisis in northern Uganda, the international community saw the northern Uganda crisis predominately in the ICC prism with the Ugandan government unable to punish the LRA. In this sense, the international community's preoccupation with punishment and its lesser concern with protection, then, can be seen as the attempt to achieve a long-term humanitarian outcome by addressing the underlying causes of human suffering: upholding justice and combating impunity by punishing perpetrators.

Nevertheless, in temporal terms, it is obvious that intervention for R2P purpose and ICC intervention are two different issues facing the international community in its attempt to stopping mass atrocities in northern Uganda. While the international community is motivated more in pursuing criminal justice for perpetrators as a longer term project of preventing mass atrocities through deterrence, ICC judicial intervention does not eliminate the need for the very real demands for civilian protection that emerge during this ongoing LRA conflict.

Thus here is the problem: the international community simply presumes that upholding justice by making the LRA leadership (perpetrators) accountable generates or equates to providing protection for northern Ugandan (civilians). How punishment and justice can be treated as protection is not clear, but this is perhaps an indication that the international community's response to northern Uganda works on the assumption that achieving long-term humanitarian outcomes of ending impunity and mass atrocity prevention should take precedence over short-term humanitarian outcomes of saving lives and stopping mass killing.

The best way to protect civilians, according to the presumption, is to prevent genocide and mass atrocities in the first place because prevention is the best form of protection. But the interesting point, in the end, may not be so much how international criminal justice will protect northern Ugandan civilians from the LRA conflict. Rather, the question is, in assuming (rightly or wrongly) the ICC will provide indirect protection of civilians, what it means to imply that ICC judicial intervention in northern Uganda should be a priority for the international community.

Along with showing support for victims of LRA atrocities in northern Uganda, the efforts of the ICC to address the root cause of the LRA conflict are largely designed to be preventive: to ensure that LRA-style mass killing of civilians do not recur. But rather than helping the Ugandan government to help itself, there is reason to believe that the ICC's attempt of pursuing root cause prevention is driven by the mistaken belief that LRA atrocities against the northern Ugandan civilians can be stopped by 'structural prevention'.<sup>91</sup> 'Structural prevention', as identified by the Carnegie Commission on Preventing Deadly Conflict, is measures and strategies which 'address the root causes of deadly conflict, so as to ensure that crises do not arise in the first place, or that, if they do, they do not recur'.<sup>92</sup>

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<sup>91</sup> Carnegie Commission on Preventing Deadly Conflict, *Preventing Deadly Conflict: Final Report*, p. 69-102.

<sup>92</sup> *Ibid.*, p. 69.

The international community's imperative to hold the LRA leadership accountable for its atrocities in northern Uganda is undeniable. But the ICC's attempt of late-stage 'structural prevention' is totally inappropriate because 'structural' or 'root cause' prevention 'must commence long before there is reason to suspect that atrocities may take place' if such measures are to make a difference.<sup>93</sup> The temporal clash between ICC intervention as a long term prevention project and R2P action as a short-term protection initiative has highlighted the problem of taking prevention too seriously. By invoking ICC to deter future LRA-style mass killing, the international community may have strengthened the 'root cause prevention' mentality, yet it has failed to address the most pressing issue: the failure of the Ugandan government to protect its civilians. In this sense, making a case for long-term preventive action is by its very nature futile because invoking ICC would not provide direct protection to northern Ugandan civilians *now* being killed in this ongoing conflict.

*Criminalizing a R2P intervention problem? Conflicting languages and competing audiences*

It is now clear that by advocating the 'structural prevention' mindset, the ICC would not be able to provide immediate protection to northern Ugandan victims of ongoing LRA atrocities. In other words, ICC has been invoked inappropriately as the first response mechanism to deal with ongoing LRA atrocities in northern Uganda. Then, what explains the international community's preoccupation with long-term preventive criminal justice-based action? Eli Stamnes has pointed out the rationale for this:

One of the reasons why preventive action is seen as attractive compared to coercive intervention, is the fact that it takes place with the consent of the state in question.

However, consent, or rather the concern for maintaining the consent, may represent an obstacle to dealing with the most pressing issues.<sup>94</sup>

As already emphasised, the most pressing issue facing the international community amidst the ongoing LRA conflict is the protection of civilians in northern Uganda. The problem here, however, is not about whether the threat of prosecution by the International Criminal Court can contribute (or is an impediment) to achieving sustainable peace in northern Uganda. Rather than its inability to capture and punish the LRA rebels, Kampala's failed military solution has instead revealed the Ugandan government's long-term failure to protect its civilians from the LRA atrocities. The real issue, as will be discussed further below, is actually about the international community's tendency to invoke the rhetoric of international criminal justice to disguise a R2P intervention problem. As such, the language of bringing LRA leadership to account for alleged crimes against humanity and war crimes did not parallel the language of responsibility for protecting northern Ugandan civilians.

The potential danger, as this case of LRA conflict reflects, is twofold. First, the international society's preoccupation with an ICC response to mass atrocities in northern Uganda simply confirms the worrying tendency among both national and international policymakers to tackle a R2P intervention problem through the international criminal justice prism. Notwithstanding the Ugandan government's failure to fulfil its protection responsibility to its civilians, ICC judicial action cannot substitute for 'timely and decisive' international R2P action in protecting civilians from ongoing LRA atrocities. That said, adopting a structural 'root cause prevention' mentality appears to have a detrimental effect

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<sup>93</sup> Eli Stamnes, "'Speaking R2P' and the Prevention of Mass Atrocities', *Global Responsibility to Protect* 1(2009), p. 76.

<sup>94</sup> *Ibid.*, p. 82.

on mobilizing international R2P response to protect northern Ugandan civilians from ongoing LRA atrocities.

Second, perhaps more worryingly, invoking ICC in northern Uganda is a matter of using the rhetoric of international criminal justice to disguise a R2P intervention problem. As clearly noted, President Museveni's self-referral of the LRA situation to the Court is the primary reason why northern Uganda has come under ICC scrutiny. The issue, as Schabas pointed out, is actually unwillingness, not inability, because Kampala 'has simply preferred to hand the prosecutions over to the Court'.<sup>95</sup> This has confirmed Stamnes' observation that the consent of the state in question 'lured' the International Criminal Court to take late-stage preventive action. As punishing perpetrators has become a moral imperative, there is potential for national and international policymakers to manipulate the language of international criminal justice so as to disguise the pressing R2P intervention problem in northern Uganda.

An interesting phenomenon regarding the ICC intervention is that 'consistent support for such judicial intervention often comes primarily from outside the impacted regions'.<sup>96</sup> Yet, it is important to note at the outset that this 'consistent support' of the international community for ICC judicial intervention in northern Uganda takes place against the background of the reluctance of the UN Security Council to take 'timely and decisive' action to protect northern Uganda civilians. Then, if there is potential for the manipulation of language by international policymakers to shape ICC or R2P actions, it is because international policymakers feel the urge to identify the potential 'target audiences' by managing their divergent demands.

The people from the impacted region and the international community constitute the primary and secondary audiences respectively. While ICC intervention in northern Uganda has largely satisfied the global audience demands, attitudes and opinions of those most affected by the LRA violence, who are supposedly the primary audiences, have never been unanimous if not divisive. According to a 2007 population-based survey 'When the War Ends', respondents identified support to develop the area (26%) and help to return home (19%) as the priorities of the international community. When asked what they felt about their top priorities, respondents demanded immediate needs for health care (45%), peace (44%), education for the children (31%) and livelihood concerns (including food, 43%; land, 37%; money, 35%), while justice (3%) has never been a top priority.<sup>97</sup>

Increased demand from a wider audience has certainly turned the ICC into a star performer. Invoking a predominantly ICC response in northern Uganda, however, is indicative of the fact that there is the question of competing audiences. The choice of a target audience—satisfying the global audience demands in the first place (rather than the affected population) for upholding justice—suggested a possible agenda for offsetting the damage to the international community caused by the lack of R2P action to protect northern Ugandan civilians. Yet it is not always a matter of using international criminal justice as a substitute for carrying out R2P action. In fact, the purpose of understanding the implication of competing audiences is not just to know which audience matters but also to

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<sup>95</sup> William Schabas, "'Complementarity in Practice": Some Uncomplimentary thoughts', *Criminal Law Forum* (2008) 19, p. 16.

<sup>96</sup> Adam M. Smith, *After Genocide: Bringing the Devil to Justice* (New York: Prometheus Books, 2009), p. 48.

<sup>97</sup> Phuong Pham (*et al*), 'When The War Ends: Peace, Justice, and Social Reconstruction in Northern Uganda', p. 3, 22.



ask a much more important question: if the R2P intervention problem is obvious, what is preventing the international community from acting on that?. Or, to put it another way, what is motivating the international community to disguise a R2P intervention problem?

Rather than entirely lacking the will to undertake R2P action, the UN Security Council's reluctance to invoke a R2P response to help protecting civilians in northern Uganda can actually be seen as a matter of avoiding the backwash effect from occurring. Here, the explanation may lie at the prospect of the UNSC's avoidance of suffering audience costs in making an empty R2P commitment. At its simplest, audience costs can be understood as 'the surge in disapproval that would occur if the leader made commitments and did not follow through'.<sup>98</sup> The meaning, then, is that leaders who take the prospect of audience costs into account when making foreign policy decisions tries to avoid making empty commitments because doing so will provoke a negative public reaction.

To put this into context, the prominence of audience costs in deciding whether to invoke ICC or R2P response to northern Uganda was evident. On the R2P front, the UN Security Council may take the view that not invoking R2P response to protect civilians in northern Uganda would cause public (both local and global audiences) disapproval to surge. Yet even the Council is genuinely concerned about the consequence of taking no R2P action, making an empty R2P commitment in northern Uganda may make the international community suffer heavier audience costs.

Why, exactly, might the UN Security Council make the commitment for R2P action in northern Uganda and then back down? Two reasons spring to mind. First, the tendency of the international community to privilege sovereigns' non-interference rights over peoples' rights, as Alex Bellamy rightly points out, has made building international consensus in the Council very difficult, in particular for authorizing coercive R2P intervention without obtaining the consent of the host government (that is, the Ugandan government).<sup>99</sup> Second, Uganda's insistence of the LRA conflict as localised and residual violence has reinforced the Council's reluctance to invoke a R2P response. In a world with audience costs, international policymakers are naturally more likely to avoid making R2P commitments because in doing so, it raises an interesting possibility: even the Council made the commitment to invoke an R2P response for protecting northern Ugandan civilians, Kampala's firm resistance of Council involvement would make the 'R2P promise' very difficult to follow through, thus exposing the international community to public backlash and having the Council's credibility undermined. In short, with respect to avoiding audience costs, international policymakers will tend to avoid the path of committing and backing down by not making R2P commitments in northern Uganda in the first place.

#### *Judicial intervention vs. R2P intervention: Competing institutions*

If it is accepted that international policymakers take the prospects of audience costs into account when invoking R2P and ICC actions, it has also become clear that both the ICC and R2P practices take place in institutionalised settings. The R2P and ICC response mechanisms are formally very different: the ICC is a permanent judicial institution, whereas

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<sup>98</sup> Michael Tomz, 'Domestic Audience Costs in International Relations: An Experimental Approach', *International Organization* 61, no. 4 (Fall 2007), p. 822.

<sup>99</sup> Alex Bellamy, *Global Politics and the Responsibility to Protect: From words to deeds* (London: Routledge, 2011), p. 2-3.

R2P does not have unitary organizational form.<sup>100</sup> While the two response mechanisms are designed to converge on the goal of ending mass atrocities through international engagement and intervention when necessary, the plurality of values and policy preferences suggests that international organizations relate to one another not just in terms of compatibility but also competition.<sup>101</sup> In this context, the absence of Security Council-authorized R2P action in northern Uganda, while coupled with the predominant ICC response, illustrates the competitive character of the relationships between the R2P enforcement mechanism (UNSC) for civilian protection and independent judicial mechanism (ICC) for perpetrator punishment.

Yet, in the context of northern Uganda, the issue is less of a concern to the question that whether peace or peace negotiations should prevail over justice. The competitive character between the Council and the Court is not reflected in the sense that they are in a strategically mutually exclusive situation. Rather, this relation of competition takes place because the international society's response is characterised by both institutional innovation and conservatism.<sup>102</sup> While the ICC has occurred as an exemplar of institutional innovation, the institutional landscape has also demonstrated a significant institutional conservatism: the UN Security Council as a locus of legitimate authority for carrying out R2P action.

To put the notion of audience costs into context, the intensity of competition is well demonstrated by the institutional conservatism of the Security Council and the Court's institutional innovation. On the one hand, the Council has been keen to avoid making an empty R2P commitment because of its audience costs concerns. The ICC, however, has an eagerness to occupy centre stage in the new institutional landscape. By attempting to demonstrate its worth, the Court is under pressure to perform as the first significant institutional innovation.

*A rising star: the ICC's effort to demonstrate its worth*

Indeed, the ICC's major contribution is its emphasis placed on the primary role of the state to prosecute under the complementarity principle as codified in Article 17 of the Rome Statute. Upon assuming office on 16 June 2003, the ICC Prosecutor Luis Moreno-Ocampo highlighted the importance of complementarity in the first place: 'The effectiveness of the International Criminal Court should not be measured only by the number of cases that reach the Court. On the contrary, the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success'.<sup>103</sup> The implication is that, as the Prosecutor reiterated, 'the policy of the Office of the Prosecutor will be to undertake investigations only where there is a clear case of failure to act by the State or States concerned'.<sup>104</sup>

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<sup>100</sup> Benjamin Schiff, 'The ICC and R2P: Problems of individual culpability and state responsibility', paper presentation at the 2011 Montreal International Studies Association annual meeting "Governing War Crimes: Politics and Practices of the ICC" March 16 2001.

<sup>101</sup> Jean-Marc Coicaud, 'International organizations, the evolution of international politics, and legitimacy', in Jean-Marc Coicaud & Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo: United Nations University Press, 2001), p. 521-522.

<sup>102</sup> Miles Kahler, 'Legitimacy, humanitarian intervention, and international institutions', *Politics, Philosophy & Economics* 10(1) (2010), p. 30-31.

<sup>103</sup> ICC Office of the Prosecutor, 'Paper on some policy issues before the Office of the Prosecutor', September 2003, p. 3.

<sup>104</sup> *Ibid.*, p. 2.

However, while Moreno-Ocampo seemingly responded to Uganda's request for opening the ICC's first investigation, the Prosecutor has actually adopted 'the policy of inviting and welcoming voluntary referrals by territorial states' in the first practice of the Court.<sup>105</sup> Indeed, 'from the beginning of the work of the International Criminal Court', as Schabas observed, 'the main efforts appear to have been aimed at attracting cases for prosecution rather than insisting that States fulfil their obligations'.<sup>106</sup> By soliciting a self-referral from Uganda, the Prosecutor has in fact encouraged the Museveni government to *abdicate* its responsibility to investigate and prosecute.<sup>107</sup>

Thus, while the Court is perceived as the political instrument for Uganda, the reverse is also true. In a similar vein, Uganda's self-referral of a R2P intervention problem appeared to be an ideal testing ground for the Court to characterise the situation in northern Uganda as an international criminal justice problem. Because the Museveni government voluntarily relinquished its jurisdiction to the ICC, the Court could portray itself as assisting the Ugandan government to obtain justice rather than interfering with Kampala's judicial sovereignty, thus silencing the Court's critics who have concerns about sovereignty and the Prosecutor's *proprio motu* power.<sup>108</sup> In this regard, the ICC's intervention to criminalize the LRA leadership should encounter little resistance.

Then, what is the reason for resorting to the policy of attracting the LRA case for ICC prosecution? Along with the immediate benefits of promised cooperation, the ICC Prosecutor's political calculation on encouraging Uganda's self-referral is based on the concern that the new international institution has to demonstrate its worth on the new institutional landscape of international criminal justice. In justifying the ICC's investigations into LRA and not UPDF alleged crimes, the Prosecutor pointed out that 'crimes committed by the LRA were much more numerous and of much higher gravity than alleged crime committed by the UPDF'.<sup>109</sup> Yet the criterion of 'gravity' has so far been inconsistently applied.<sup>110</sup> In fact, it was only when the Court came under increasing criticism for its bias and one-sidedness that 'gravity' emerged as the Prosecutor's 'central' criterion in his case selection and prosecutorial strategy.<sup>111</sup>

Given the ICC's political agenda in having a successful first case, Uganda's self-referral has played into the hands of the ICC Prosecutor with respect to his approach to case selection and prosecutorial strategy. In an attempt to show that criticisms about unlikely cooperation from situation states are incorrect, the Prosecutor has fallen prey to building the short-term credibility of the Court by letting the LRA case go to the ICC. In the words of the International Crisis Group:

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<sup>105</sup> William Schabas, Carsten Stahn & Mohamed M. El Zeidy, 'The International Criminal Court and Complementarity: Five Years On', 19(1) *Criminal Law Forum* (2008), p. 1.

<sup>106</sup> William Schabas, "'Complementarity in Practice": Some Uncomplimentary thoughts', *Criminal Law Forum* (2008) 19, p. 6.

<sup>107</sup> Cedric Ryngaert, 'The Principle of Complementarity: A Means of Ensuring Effective International Criminal Justice', p. 150. [*emphasis original*]

<sup>108</sup> Paola Gaeta, 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?', p. 950; Sarah Nouwen & Wouter Werner, 'Doing Justice to the Political', p. 953.

<sup>109</sup> ICC, 'Statement by the Chief Prosecutor on the Uganda Arrest Warrants', The Hague, October 14, 2005.

<sup>110</sup> William A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', *Journal of International Criminal Justice* 5 (2008), p. 731-761.

<sup>111</sup> *Ibid.*, p. 731-761.

‘The Court needs to be successful in Uganda—one of its first operations—in order to demonstrate that it is an effective instrument. It cannot afford to be seen as a mere tool of a government’s policy. At the same time, it will not want to be viewed as rigid and unrealistic since it hopes to encourage other countries to follow Uganda’s example and invite it to fulfil its high mission.’<sup>112</sup>

This reveals the dilemma of ICC practice: ‘in making decisions as to what cases to accept and whom to prosecute, the Office of the Prosecutor responds to genuine episodes of egregious violence, but must also respond to the ICC’s need to be effective’.<sup>113</sup> In this regard, instead of maintaining its even-handedness and objectivity between the LRA and UPDF, the Court has succumbed to the temptation of prioritising its short-term institutional interest in ‘making its mark’<sup>114</sup> instead of embracing the complementarity principle.

*The end of ICC-Uganda honeymoon: back to the (failing) military solution*

There are two main strands to the ‘special relationship’ between ICC and Uganda. One is the Museveni’s political agenda to disguise the LRA atrocities as an international criminal problem; the other the ICC’s short-term institutional interest to establish its credibility and reputation by securing a successful first case. Yet this friendly ICC-Uganda relation is vulnerable to erosion. While Museveni voluntarily relinquished jurisdiction to the ICC, the President also revealed his not-so-hidden intention to undermine the ICC justice process from time to time.<sup>115</sup> In a bid to convince the LRA to sign a peace agreement, the Ugandan government has begun to pressurize the Court to drop the charges against the LRA leadership. The request, although being supported by various local civil society leaders, was in direct contravention of the Rome Statute and its mandate to end impunity. The Court had been used opportunistically by the Museveni government as if being ‘a convenient hot water tap that can be turned on or off’.<sup>116</sup>

However, Kony’s constant failure to show up to finalise the deal has sealed the fate of a peaceful solution to the LRA conflict after 2 years of peace efforts since 2006. The complete unreliability of Kony as a possible peace negotiator seemed to leave President Museveni with few options. This prompted his government to look for another military solution by launching a 3-month military operation—*Operation Lightning Thunder* on 14 December, 2008. With the cooperation from the DRC and southern Sudan, this joint military offensive was aimed to pursue Kony and his fighters in Garamba National Park in north-eastern Congo, where the group had established a base since 2005.

Perhaps not surprisingly, this Security Council-backed operation<sup>117</sup> did nothing to counter the group but provoke more reprisal attacks against civilians. Since the launch of *Operation Lightning Thunder*, ‘the LRA has brutally murdered more than 1000 people in north-eastern Congo and southern Sudan and abducted nearly 250 children’.<sup>118</sup> About 100,000 people have been displaced and half of the displaced have no access to

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<sup>112</sup> ICG, *Building a Comprehensive Peace Strategy for Northern Uganda*, Africa Briefing, No. 27, p. 9.

<sup>113</sup> Adam Branch, ‘Uganda’s Civil War and the Politics of ICC Intervention’, p. 189.

<sup>114</sup> Phil Clark, ‘Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda’, p. 10.

<sup>115</sup> Errol Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Cheltenham: Edward Elgar, 2010), p. 107.

<sup>116</sup> See Katy Glaborow, ‘ICC-Africa Peace Versus Justice in Uganda’, *Institute for War and Peace Reporting* (7 September 2006).

<sup>117</sup> ‘DRC: Civilians suffer as Uganda takes on LRA’, *IRIN News*, 20 January 2009.

<sup>118</sup> Julia Spiegel & Noel Atama, ‘Finishing the Fight Against the LRA’, *Enough Project*, 12 May 2009.

humanitarian assistance.<sup>119</sup> Just like a narrow focus on ICC intervention distracts attention from the question of addressing the wider need for civilian protection, the Museveni government has after all failed in its primary stated objective of capturing Kony or crushing the LRA, thereby leaving the civilians in the LRA-affected areas more vulnerable to violence.

### **Concluding Observations: The need to maintain a focus on a R2P intervention problem**

While the LRA's commitment to finding a peaceful solution is highly questionable, Museveni's military solution to secure a sounding victory over Kony's force has proved again an utter failure. Even though the number of LRA fighters has dwindled from its peak of an estimated 800 to 400 since the *Operation Lightning Thunder* in 2008,<sup>120</sup> the lingering threat of the LRA pose to civilians is reflected in two worrying tendencies that international policymakers have to tackle with: LRA's continuous massive abduction campaign to replenish its force and the significant increase in the number of LRA attacks during the first quarter of 2011.<sup>121</sup>

Amidst the Museveni government's constant attempt to play down the size and threat of the LRA, perhaps more concerning for the international policymakers is Museveni's act of reducing its military presence in LRA-affected areas in Congo.<sup>122</sup> By deploying troops to the African Union mission in Somalia (AMISOM), the effectiveness of UPDF to crush the LRA fighters 'once and for all' has been further eroded, not to mention protecting civilians from LRA's reprisal attacks. While there is every reason for Museveni to trumpet the success of his troops in driving Kony's LRA away from Uganda since 2006, the real danger is that the group 'may simply outlast the willingness of the UPDF' to pursue them.<sup>123</sup> In this sense, the Ugandan defense minister's announcement to cease funding for the LRA war in the 2011 budget<sup>124</sup> is the most visible symbol of Museveni government's failure to outdo the LRA militarily.

Yet, there is reason to be positive about the course of action that the international policymakers will take in response. Not long after the *Operation Lightning Thunder*, the LRA Disarmament and Northern Uganda Recovery Act was introduced into US Congress in May 2009 on a bipartisan basis. On 24 May 2010, US President Barack Obama signed the bill into law.<sup>125</sup> In particular, section 4 of the law requires the President to develop a strategy for

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<sup>119</sup> 'DRC: Civilians suffer as Uganda takes on LRA', *IRIN News*, 20 January 2009.

<sup>120</sup> Sudan Human Security Baseline Assessment (HSBA), 'Lord's Resistance Army', July 2011, available at <http://www.smallarmssurveysudan.org/pdfs/facts-figures/armed-groups/southern-sudan/HSBA-Armed-Groups-LRA.pdf> [accessed 28 July 2011].

<sup>121</sup> UN Office for the Coordination of Humanitarian Affairs (OCHA), *LRA Regional Update: DRC, CAR and south Sudan-January-March 2011*, 7 April 2011, available at <http://www.unhcr.org/refworld/docid/4da28f52.html> [accessed 29 July 2011].

<sup>122</sup> Ashley Benner, 'Congo Government, UN Underestimate LRA Threat', *The Enough Project*, 8 April 2011.

<sup>123</sup> Andre Le Sage, 'Countering the Lord's Resistance Army in Central Africa', *Strategic Forum* 270, July 2011, available at <http://www.ndu.edu/press/lib/pdf/StrForum/SF-270.pdf> [accessed 8 August 2011].

<sup>124</sup> Sudan Human Security Baseline Assessment (HSBA), 'Lord's Resistance Army', July 2011.

<sup>125</sup> The White House, Office of the Press Secretary, 'Statement by the President on the Signing of the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009', 24 May 2010.

viable multilateral efforts to 'mitigate and eliminate the threat to civilians and regional stability posed by the Lord's Resistance Army'.<sup>126</sup>

Significantly, this landmark legislation is a recognition that the US government, in Obama's words, 'must all renew [our] commitments and strengthen [our] capabilities to protect and assist civilians caught in the LRA's wake, to receive those that surrender, and to support efforts to bring the LRA leadership to justice'.<sup>127</sup> Accordingly, the Obama administration's strategy has four main building blocks: (1) increase protection of civilians; (2) apprehend or remove from the battlefield Joseph Kony and senior commanders; (3) promote the defection, disarmament, demobilization and reintegration of remaining LRA fighters; and (4) increase humanitarian access and provide continued relief to affected communities.<sup>128</sup>

Understandably, a 'disarmament' approach to 'mitigate and eliminate' the LRA has never been promising, as the latest 2008 'Lightning Thunder' military offensive demonstrates. Yet, given the LRA's indiscriminate violence in the central Africa region, there is a renewed sense of urgency for triggering international R2P action to ensure the protection of civilians. In some lights, the US commitment to tackling the LRA problem is encouraging because of its focus on increasing the level of protection to civilian populations. After a long period of international society's reluctance to act, there appears, at least, to be a growing tendency to invoke a R2P response so as to tackle a R2P intervention problem in northern Uganda and other LRA-affected areas.

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<sup>126</sup> 'Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009', 111<sup>th</sup> Congress, United States Government Printing Office, 24 May 2010.

<sup>127</sup> Ibid.

<sup>128</sup> The White House, Office of the Press Secretary, 'Letter from the President on the Strategy to Support the Disarmament of the Lord's Resistance Army', 24 November 2010.

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