

**SEMINAR ON INTERNATIONAL CRIMINAL JUSTICE, CHALLENGES FOR  
DOMESTIC PROSECUTIONS AND PROGRAMMES FOR VICTIMS' ACCESS**

**TO JUSTICE AND REPARATIONS**

**THURSDAY 26, SEPTEMBER 2013**

**PARLIAMENT CONFERENCE HALL, PARLIAMENT OF UGANDA**

*“The most serious crimes of concern to the international community ...should not go unpunished and their prosecution should be ensured by measures at both domestic and international level”* **Preamble to the Rome Statute of the ICC**

Justice and accountability for the most serious crimes are recurrent topics in discussions between institutions, intergovernmental organizations and civil society across the globe. Parliaments play a pivotal role in shaping the legal and policy framework for an effective and fair justice system which is victims' centered, but also providing political support and oversight. Indeed, the importance of domestic prosecution of international crimes cannot be understated since the International Criminal Court (ICC) can only play a complementary role to national judicial systems. In many instances it is preferable for a competent national court to decide on a case within its own jurisdiction. This provides an impetus in establishing a culture of legal justice in the aftermath of massive crimes and to halt their repetition. Indeed in creating the ICC, the drafters of the Rome Statute assigned primary responsibility for dealing with its crimes enlisted in article 5 (Genocide, war crimes, crimes against humanity and aggression) to national authorities<sup>1</sup>.

The situation in Northern Uganda occasioned by the over two decade's old war, referred by Uganda to the ICC, has placed Uganda onto the international criminal justice's radar. As the first situation before the ICC, adjudication of suspects remains pending since none of the suspects have been apprehended. Due to the complex nature of the conflict, a number of initiatives have been prompted to provide a holistic redress to the devastating harm caused to thousands of victims and put an end to impunity by bringing to justice perpetrators who committed atrocities with the required intent and knowledge.

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<sup>1</sup> Preamble to the Rome Statute of the ICC.

The establishment of the International Crimes Division (ICD) in 2007, followed by the domestication of the ICC Act, 2010, unanimously adopted by parliament, is commendable, considering that Uganda has ratified a number of treaties but incorporated only a few. This is a clear indication that the days of impunity are over as perpetrators can be apprehended in any part of the world and prosecuted, and it represents a guarantee of non-repetition, safeguarding future generations of Ugandans. It places the Legal & Parliamentary Affairs Committee of Parliament with the task to oversee the full "implementation" of the ICC Act 2010, along with the Transitional Justice package prepared by the Justice, Law and Order Sector (JLOS) of the Ugandan Government. Therefore, this Seminar is essentially designed for a high-level Ugandan audience. A significant part of the seminar will be devoted to national solutions for achieving justice and accountability while a broad discussion on the evolution of the international criminal justice system will instigate the discussion. Moreover, the seminar will conclude with an action plan to address the challenges identified from a parliamentary perspective.

**The goals of the seminar are:**

- To provide an opportunity for legislators to discuss and appreciate the importance of accountability and justice for serious crimes of international concern;
- To provide input to transitional justice developments in the country, such as the Transitional Justice framework;
- To provide an opportunity to identify challenges and offer practical solutions and political support towards achieving justice for victims of heinous crimes.

This informative background document sets out the issues to be discussed. The sessions will take place in the format of interactive discussions, thus stimulating a lively debate among participants. The seminar will be held in English. Report will be sent to all participants.

## SESSION 1:

### **WHERE DID IT ALL COME FROM? WALKING THE JOURNEY OF INTERNATIONAL CRIMINAL JUSTICE**

#### *From Nuremburg to Hague: the evolution of international criminal justice*

International criminal justice has been an evolutionary process commencing with the Nuremberg Trials (1946) and Tokyo Tribunals (1946-8) established immediately following World War II. Its evolution however ushered in a significant departure from previous international accountability efforts on state responsibility as it was centered around the principle of individual responsibility for the most serious violations of international law. In the 1990s, after the end of the “Cold War”, more developments unfolded with the establishment of the ad hoc tribunals to prosecute individuals for crimes committed in the former Yugoslavia and Rwanda, and this culminated with the establishment of the permanent International Criminal Court.

On 17 July 1998, the adoption of the Rome Statute of the International Criminal Court by the United Nations Diplomatic Conference marked a turning point in the global efforts to rebuild the international society on the basis of the rule of law. Three months later, on 16 October 1998, Senator Augusto Ugarte Pinochet, the former President of Chile, was arrested in London pursuant to a request for his extradition to Spain to face charges for crimes against humanity, which had occurred while he was head of state in Chile. This marked the first time a former head of state had been arrested in England on such charges, and it was followed by legal proceedings, which confirmed that he was not entitled to claim immunity from the jurisdiction of the English courts for crimes which were governed by an applicable international convention.

Seven months later, on 27 May 1999, President Slobodan Milosevic of the Federal Republic of Yugoslavia was indicted by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia for atrocities committed in Bosnia and Croatia. This marked the first time that a serving head of state had ever been indicted by an international tribunal.

These three developments, taking place in a period of less than a year, indicated the extent to which the established international legal order was undergoing a transformation, and the emergence of a new system of ‘international criminal law’. They were not spontaneous

occurrences. Rather, they built on developments in international law over the past fifty years. Particularly in the fields of human rights and humanitarian law which reflect a commitment of the international community to put in place and to enforce rules of international law which would bring to end impunity for the most serious international crimes.

At the Rome Conference in 1998 in Rome, Italy, 160 countries participated in the negotiations with the presence of more than 200 NGOs. At the end of five weeks of intense negotiations, 120 nations voted in favor of the adoption of the Rome Statute of the ICC, with seven nations voting against the treaty (including the United States, Israel, China, Iraq, Qatar and Syria) and 21 states abstaining.

On 1 July 2002, the treaty entered into force after the 60th ratification necessary to trigger the entry into force of the Rome Statute was deposited by several states.

The ICC is the first permanent international judicial body mandated to try individuals for genocide, crimes against humanity and war crimes when national courts are unable or unwilling to do so. It has 122 Member States, out of which 34 are from Africa. Currently, the ICC is involved in 8 situations, the Democratic Republic of the Congo, Central African Republic, Darfur, Uganda, Kenya, Ivory Coast, Libya and Mali. Three “situations” have been referred to the Prosecutor by States Parties (Uganda, the Democratic Republic of the Congo, and the Central African Republic), two situations (Darfur/Sudan and Libya) have been referred by the UN Security Council, the Libya situation recently, at the beginning of March 2011, through an unanimous Security Council decision. One investigation (Kenya) was started by the Prosecutor *proprio motu*, at the request in particular of Kofi Anan who mediated an end to the post election violence in early 2008. Uganda was the first country to refer a situation to the ICC in 2003 and arrest warrants subsequently issued in 2005 for five top Lord’s Resistance Army leaders (three have since died and prosecutions against them have been terminated). To-date, no arrest warrant has been executed in the Ugandan situation.

As earlier noted, the ICC works under the principle of complementary and so national judicial systems have the prior responsibility in prosecuting crimes within their jurisdiction. In 2007, the Ugandan government established the International Crimes Division (formerly War Crimes

Division) to try international crimes locally. Since its establishment, only one suspect, Thomas Kwoyelo, a middle level commander in the LRA, was produced in Court but the trials have since come to a halt due a pending appeal from the Constitutional Court to the Supreme on the question of amnesty, while other questions relating to the age of the accused remain pending.

## **SESSION 2:**

### **THE CURRENT CHALLENGES FACING PROSECUTION OF INTERNATIONAL CRIMES (DOMESTIC AND INTERNATIONAL PERSPECTIVE)**

The ability to actually enforce legal norms and in particular execute arrest warrants is a critical notion in the realm of international law. Although international humanitarian law and international criminal law treaties include a wide range of rules governing the enforcement of their norms, their application depends ultimately on the states, both in national and international proceedings; in the latter case specifically because the states' cooperation is necessary in the area of investigation and the arrest and surrender of persons.

In the domestic context, the recent years have seen an increased focus on enabling national courts to conduct trials of serious crimes that violate international law, such as genocide, war crimes, and crimes against humanity. In particular, states parties to the ICC have devoted greater attention to promoting complementarity, the principle that national courts should be the primary vehicles for prosecuting serious crimes.

This is important because international courts and hybrid international tribunals will only ever be able to prosecute a limited number of individuals, usually at the highest levels of alleged responsibility, while the fight against impunity requires a more far reaching and broader response.

Moreover, national trials in countries where crimes are committed are most often best placed to ensure efforts to hold perpetrators to account have maximum resonance with local populations, and credible domestic prosecutions help ensure and build further respect for rule of law in the relevant country.

However, much more progress still has to be made in strengthening domestic capacity to ensure that investigations and prosecutions of these serious crimes can take place. In the case of

Uganda, a number of challenges require addressing if national solutions are to be harness to achieve justice and accountability.

1. **Problematic legal framework.** There are three national laws and legal interpretation matters that may create major challenges for the International Crimes Division (ICD): Uganda’s Amnesty Act, Uganda’s ICC Act, and –albeit to a lesser extent– the availability of the death penalty as a punishment.

- o **Amnesty Act**

Uganda’s Amnesty Act provides that any rebel who “renounces and abandons involvement in the war or armed rebellion”<sup>2</sup> may receive amnesty. By its terms, the act appears to preclude all cases of LRA members so long as they reject rebellion, irrespective of the ICD or the crimes in which LRA members may be implicated.

Over 12,000 LRA members have received amnesty since the Amnesty Act was adopted in 2000, including more senior members than Kwoyelo, and LRA members have continued to be granted amnesty since the ICD’s inception.<sup>3</sup> Notably, Lt. Col. Charles Arop, the LRA’s former director of operations, surrendered to Ugandan troops in November 2009, and was granted amnesty in late 2009. Arop is accused of leading the “Christmas Massacres,” part of a series of attacks in 2008 and 2009 resulting in the deaths of at least 620 civilians and the abduction of more than 160 children in DRC.

Amnesties for genocide, war crimes, and crimes against humanity are inconsistent with international law and practice, which provide that such crimes should be prosecuted. In addition, Kwoyelo’s prosecution—albeit now stalled—while other LRA members received amnesty, may raise question about the possibility of selectivity of cases before the ICD pursued by prosecutors.

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<sup>2</sup> 4Amnesty Act (Ch 294), January 21, 2000, [http://www.ulii.org/ug/legis/consol\\_act/aa2000111/](http://www.ulii.org/ug/legis/consol_act/aa2000111/) (accessed November 4, 2011), sec. 3(1)(b)

<sup>3</sup> Amnesty Record, 2011.

- **The International Criminal Court Act 2010 (ICC Act 2010)**

The ICC Act, 2010, replicates serious crimes and modes of liability under the Rome Statute offenses as Ugandan law.<sup>4</sup> However, all the international crimes committed in North Uganda were committed prior to 2010. While the principle of non-retroactivity stands firm for domestic offences, Art. 15 of the International Covenant on Civil and Political Rights (ICCPR) and customary international law permit the retrospective application of the ICC Act to crimes that were recognized as such under international law at the time in which they were committed. This is because the conduct to be prosecuted was already a crime under international law, and the national law is not creating a new offense, but only establishing jurisdiction to try the offense. This is the case for genocide, war crimes, and crimes against humanity where there is no violation of the principle of non-retroactivity. However, this is not the position in Uganda as the Geneva Conventions Act (1964) is being applied instead of the ICC Act, for fear of violating the non-retroactivity principle. It is yet to be seen whether charges under the Geneva Conventions Act will be upheld and pass the test of a conflict of international character.

## **2. Witness and Victim Protection**

More often, witnesses who testify in trials of serious crimes, some of whom are likely to be direct victims themselves, are facing serious security risks before, during, and after giving testimony. They may confront direct threats to the safety of their families and be in need of ongoing psychosocial support in the aftermath of testifying about deeply traumatic events. Witness protection and support is a significant issue for the ICD: while witness protection has not been completely absent in Uganda, measures are ad hoc, informal, and limited, and there is no legal regime for witness protection (although some relevant provisions do exist, such as sanctions for attacks on witnesses). Steadfast process needs to promote witness protection and support to benefit the ICD and the justice system.

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<sup>4</sup> International Criminal Court Act (“ICC Act”), Acts Supplement No. 6, Uganda Gazette, no. 39, vol. CIII, June 25, 2010. PGA Members, under the leadership of Hon. Tashobya, played a very important role in creating the conditions for the unanimous adoption of this Bill on 10 March 2010.

### **3. Right to an Adequate Defense**

The right to adequate defense is a fundamental right of all accused under international law and Uganda's constitution. Accordingly, adequate resources and facilities to prepare a defense is a prerequisite to realize this right. The lack of assistance to defense counsel and the limited time they have to prepare pose serious concerns to assuring the right to a fair trial in criminal cases generally.

### **4. Rotating Core Staff**

It is common for judges, registrars, prosecutors, and investigators in Uganda to be frequently rotated on and off work relating to specific divisions. While several rationales may be offered for rotation, namely that it can promote staff versatility and competence in the justice sector, allow a wider array of staff to benefit from trainings on particular initiatives, and assist in managing the small number of professionals who can play key roles across the system. However, rotations can cause loss of developed knowledge and expertise in a specialized legal area, including because cases involving serious crimes can take an extended period to investigate and prosecute. In the two years since the ICD has been operational, two registrars and at least one of the division's prosecutors have been rotated from the ICD to work with other divisions.

### **5. Child Soldiers**

Under International Law, enslavement and sexual enslavement of children during armed conflict are war crimes, and enslavement of children during peace time in the framework of a widespread or systematic attack against civilians are crimes against humanity: Enslavement is among the most brutal crimes against children. Additionally, the recruitment, conscription and/or use of children into armed forces (whether forced or not) is one of the worst forms of exploitation of the child and is a war crime under the Rome Statute of the ICC, given that no genuine consent to join an armed group may be given by a child below 15 years of age. The vulnerability of children means that they need to be afforded particular protection that does not apply to the general population.



The historical background behind the war crime of enlisting children is securing their physical and psychological well-being, including not only injuries due to fighting but also the serious trauma that can remain, including the separation from family, the disruption of schooling and the devastating effect that enslaving children into an armed group may have on the survivor-child for the rest of her or his life, as well as for the devastating impact of the communities affected by child-recruitment and enlistment.

As you are well aware, in Uganda, under the leadership of Joseph Kony, the so-called Lord Resistance Army has abducted over 20,000 children under the age of 15. This number constitutes up to eighty percent of the rebel group's membership. Parliamentarians for Global Action (PGA) – including its Ugandan and Central African Republic National Groups – strongly supports the efforts of the ICC and of the International Community to arrest and surrender Joseph Kony and the other indicted leaders of the LRA to the ICC. In another case, in the Democratic Republic of Congo, Thomas Lubanga Dyilo had been the first individual who had been found guilty as co-perpetrator of the charges of conscripting and enlisting children under the age of 15 into the “Union of Congolese Patriots” (The UPC) and the “Patriotic force for the liberation of Congo” (the FPLC) and of using those children to participate actively in hostilities in the DRC. In July 2012, Lubanga has been sentenced by the ICC to 14 years in prison. This has been the first sentence issued by the ICC. The recruitment of children into armed conflict is in most cases a form of enslavement. Even in cases where children joined armies voluntarily, it is only because of the circumstances and a matter of pure survival. In the judgment of the Lubanga case it had been stated “the consent of a child to recruitment does not constitute a valid defense to any of the crimes of which Lubanga has been convicted”.

The domestic implementation of the Rome Statute, in Uganda through the ICC Act, provides a unique opportunity for an increased protection of children as victims of conflict and is enhancing their access to justice. PGA recognises the status of child-soldiers not as perpetrators but as victims of one of the most serious crimes against the international community as a whole.

SESSION 3:

**ADDRESSING THE DILEMMAS AND CHALLENGES: WHAT WE NEED TO DO TO  
ATTAIN FAIR & EFFECTIVE JUSTICE –THE WAY FORWARD AND DISCUSSION  
OF THE *PGA KAMPALA PLAN OF ACTION***

This part will be drafted based on discussion and outcome of the Seminar and will be available on the PGA Website, PGA Uganda Country side, together with the Kampala Plan of Action, list of participants, pictures. Please check for outcome documents at the website: <http://www.pgaction.org/countries/africa/uganda.html>