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# The Continuing Peace with Justice Debate: Recent Events in Uganda and the International Criminal Court

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# The Continuing Peace with Justice Debate: Recent Events in Uganda and the International Criminal Court

Linda M. Keller\*

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Uganda, the first state to refer a situation to the International Criminal Court (ICC),<sup>1</sup> came to exemplify the peace versus justice debate. The Ugandan conflict with the Lord's Resistance Army (LRA) raised questions over whether there must be a choice between successful peace negotiations and prosecution at the ICC.<sup>2</sup> I previously explored the peace versus justice debate in Uganda, which can also be recharacterized as a debate over what *sort* of justice, broadly speaking: Western, retributive justice based on prosecution and incarceration, or traditional, restorative justice based on tribal ceremonies and reconciliation.<sup>3</sup>

Using Uganda as an example, I proposed an approach to harmonize these conceptions of justice in the context of ICC deferrals to traditional justice mechanisms. This symposium, honoring the work of international criminal

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\* Vice Dean, Assistant Professor of Law, Thomas Jefferson School of Law; JD Yale Law School 1996. This article is based on a presentation given at the 2016 Global Center Annual Symposium, *Crimes without Borders: In Search of an International Justice System*, University of the Pacific, McGeorge School of Law (March 4, 2016). The author would like to thank Professor Linda Carter and all the organizers and participants in the symposium.

1. *Situation in Uganda*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/uganda> (last visited Aug. 20, 2016) (on file with *The University of the Pacific Law Review*).

2. Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT'L L. 209, 211 (2008).

3. *Id.*

justice scholar Linda Carter, offers an opportunity to revisit these issues. I will briefly summarize the Uganda / ICC relationship and the Ugandan / LRA conflict. I will then recap the ways in which the ICC might defer to Ugandan proceedings. Next, I will condense my proposal for looking to the goals of international criminal justice to determine whether the ICC *should* defer to Ugandan proceedings such as the traditional justice of mato oput. Finally, I will bring us up to date with the current controversies related to prosecuting the LRA in two ways: first, by looking at the ICC case against Dominic Ongwen, the only alleged LRA commander in ICC custody; and second, by reviewing the bumpy road to domestic prosecution of alleged LRA leader Thomas Kwoyelo in light of Uganda's Amnesty Act.

I conclude that more recent events do not offer much insight on whether domestic prosecution or traditional alternatives further the goals of international criminal justice. By contrast, it seems that neither the ICC nor Uganda has faced the hard questions. Rather than requesting Ongwen be prosecuted in Uganda, it seems that Uganda found it more convenient, for resource and political reasons, to leave Ongwen's controversial prosecution to the ICC. Rather than using the Kwoyelo case as an opportunity to establish a coherent policy on amnesty or other non-prosecutorial alternatives, it seems making an example of Kwoyelo was politically expedient at the time. Although the prosecution of Kwoyelo could be the harbinger of a push for prosecutorial accountability for LRA in Uganda, the far more numerous examples of LRA members receiving amnesty call this into question. Given the difficulties encountered to date in prosecuting Kwoyelo before domestic courts, it seems unlikely the Ugandan government will be eager to withhold amnesty from others. A successful conclusion to the Kwoyelo prosecution, however, may lead to the opposite reaction. At the time of the writing of this article, the Kwoyelo case had not yet gone to trial.

#### I. BACKGROUND ON THE ICC & UGANDA CASES

The ICC was established by treaty, known as the Rome Statute.<sup>4</sup> Its jurisdiction includes genocide, war crimes, and crimes against humanity (and possibly crimes of aggression).<sup>5</sup> It is a court of "complementary" jurisdiction<sup>6</sup>—intended to supplement, not supplant, state prosecutions.<sup>7</sup> Under the principle of complementarity, the ICC only steps in where the state is not acting, or is unwilling or unable genuinely to investigate or prosecute those most responsible for international crimes.<sup>8</sup>

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4. *Id.* at 215.

5. *Id.* at 215–16.

6. *Id.* at 252.

7. *Id.*

8. *Id.* at 215–16.

In the case of Uganda, the government asked the ICC to investigate LRA atrocities.<sup>9</sup> The LRA is led by Joseph Kony, who became world-famous due to the viral video *Kony 2012*.<sup>10</sup> The conflict between the government and the LRA has raged with varying intensity for years, punctuated by failed peace initiatives.<sup>11</sup> Hundreds of thousands have been displaced by the conflict, and civilians targeted in raids on villages and internally displaced persons camps.<sup>12</sup> The LRA has committed numerous atrocities, but it is perhaps best known for kidnapping children and forcing them to become LRA fighters or sex slaves.<sup>13</sup>

The ICC Office of the Prosecutor (OTP) opened an investigation into crimes of the LRA (and supposedly all parties to the conflict), a step that is credited by some with bringing the LRA to the negotiating table.<sup>14</sup> ICC arrest warrants, unsealed in October 2005, charge war crimes and crimes against humanity against Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen.<sup>15</sup> The cases against Odhiambo and Lukwiya were terminated after their deaths were confirmed by the ICC.<sup>16</sup> Otti has reportedly been killed on Kony's orders.<sup>17</sup> As discussed below, Ongwen is at the ICC awaiting trial.<sup>18</sup>

The most serious peace negotiations to date took place in Juba in 2006–2008.<sup>19</sup> Though various agreements were drafted, the final deal offered a blend of prosecutorial and transitional justice mechanisms, leaving unclear whether Kony was being offered promises of non-prosecution.<sup>20</sup> Regardless, Kony refused to sign the agreement and resumed hostilities in other parts of Africa.<sup>21</sup>

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9. *Id.* at 215.

10. Nicholas Kristof, Opinion, *Viral Video, Vicious Warlord*, N.Y. TIMES, Mar. 15, 2012, at A35.

11. Keller, *supra* note 2, at 214–15.

12. *Id.* at 214.

13. *Id.* at 213. The LRA's notoriety for certain crimes, such as abductions, may be overstated in some sources but nonetheless reflects serious international crimes. See THE LORD'S RESISTANCE ARMY: MYTH AND REALITY 133 (Tim Allen & Koen Vlassenroot, eds., 2010) (discussing perceived versus actual abductions by LRA).

14. *Id.* at 216.

15. *Id.* at 217.

16. Kony et al. Case, Case No. ICC-02/04-01/05 (July 8, 2005), <https://www.icc-cpi.int/uganda/kony/Pages/default.aspx> (on file with *The University of the Pacific Law Review*).

17. Noel Mwakugu, *Obituary: LRA Deputy Vincent Otti*, BBC NEWS (Jan. 23, 2008, 14:16 GMT), <http://news.bbc.co.uk/2/hi/africa/7083311.stm> (on file with *The University of the Pacific Law Review*); THE LORD'S RESISTANCE ARMY: MYTH AND REALITY, *supra* note 13, at 18.

18. The Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15 (Mar. 26, 2016), <https://www.icc-cpi.int/uganda/ongwen/Documents/OngwenEng.pdf> (on file with *The University of the Pacific Law Review*).

19. THE LORD'S RESISTANCE ARMY: MYTH AND REALITY, *supra* note 13, at 17.

20. Keller, *supra* note 2, at 209, 218–22.

21. Paul Ronan & Lisa Dougan, *Joseph Kony's LRA Is Still Abducting Children, Even After CAR Votes for Peace*, NEWSWEEK (Mar. 6, 2016, 6:02 AM), available at <http://www.newsweek.com/joseph-kony-lords-resistance-army-child-soldiers-433360> (on file with *The University of the Pacific Law Review*); see also LRA CRISIS TRACKER REPORTS, <https://reports.lracrisistracker.com/> (last visited June 25, 2016) (on file with *The University of the Pacific Law Review*).

The LRA initially demanded that the ICC warrants be withdrawn as a condition of any agreement,<sup>22</sup> setting up a conflict between peace and justice.<sup>23</sup> I believe that the peace versus justice dilemma sets up a false dichotomy. I am not the first to take this position. Others also say that it is possible to have both peace and justice.<sup>24</sup> The trick is to figure out how to do so. The ICC should not rigidly require ICC prosecutions in all circumstances. It should defer to states to come up with alternatives to ICC prosecution when necessary to achieve both peace and some measure of justice.

## II. POTENTIAL AVENUES FOR ICC DEFERRAL

Assuming that Kony is genuinely willing to make peace—a big and rather dubious assumption—how can the ICC promote both peace and justice? The ICC can defer to state prosecutions under the Rome Statute, so the ICC could potentially defer to Uganda if Kony and Uganda agree that Kony will be prosecuted at the state level, so long as that prosecution is not a sham trial.<sup>25</sup> But what if Kony holds out for something other than prosecution and punishment, such as a traditional alternative called *mato oput*? The ICC might be able to defer to this traditional justice mechanism, but such a finding might stretch the Rome Statute beyond what some consider its plausible interpretation.<sup>26</sup> More significantly, the ICC should not take such a step unless it also furthers the apparent goals of international criminal justice.

I should mention some caveats here based on the confusing facts on the ground. I will focus on Kony's demand for the nonprosecutorial alternative of *mato oput*, as that has been his most consistent position.<sup>27</sup> Uganda's position, however, is less clear.<sup>28</sup> President Museveni has, at times, indicated that traditional justice like *mato oput* would be offered as part of the peace deal.<sup>29</sup> The

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22. Keller, *supra* note 2, at 211.

23. *Id.*

24. *Id.*

25. *Id.* at Part III.D.

26. Other scholars have written about the potential ways the ICC might defer to states. For example, in their forthcoming book, Professors Linda Carter and Charles Jalloh provide insightful analysis of nonjudicial proceedings in the ICC context, focusing on Articles 17, 21, and 53. They recommend an expert panel to examine the legal and policy issues regarding the status of nonjudicial alternatives under the Rome Statute given the uncertainty of the statutory language. Linda E. Carter & Charles Chernor Jaolloh, *The Relationship of International Criminal Courts with National Nonjudicial Proceedings*, in *THE INTERNATIONAL CRIMINAL COURT IN AN EFFECTIVE GLOBAL JUSTICE SYSTEM* (forthcoming 2016) (Chapter 4 on file with author).

27. Keller, *supra* note 2, at 218–21; see *THE LORD'S RESISTANCE ARMY: MYTH AND REALITY*, *supra* note 13, at 258 for a discussion on how LRA adopted Acholi justice at Juba negotiations despite confusion over application to Kony. The account in this source indicates that Kony also looked to the example of South Sudan in seeking both money and a position in the government. *Id.* at 184.

28. Keller, *supra* note 2, at 220.

29. *Id.*

peace deal itself refers to mato oput and other traditional justice mechanisms.<sup>30</sup> It refers to a truth forum, which seems to be a Ugandan truth commission.<sup>31</sup> But it also refers to state prosecution, albeit with some confusing references to alternative penalties.<sup>32</sup> It seems less likely that Kony would agree to state, but not ICC, prosecution as part of the peace deal. As a result, I am going to focus on just one type of non-prosecutorial alternative here: mato oput.<sup>33</sup>

Mato oput is described as a traditional reconciliation process of the Acholi tribe of Northern Uganda.<sup>34</sup> Kony is Acholi, as are many of his fighters and his victims.<sup>35</sup> Traditionally, the mato oput ceremony was used to resolve conflicts among clans.<sup>36</sup> It is sometimes known as “drinking the bitter root” because the ceremony includes members of opposing parties drinking a bitter drink together.<sup>37</sup> But mato oput can be far more than that. It can be a complex conflict resolution process involving fact-finding, mediation, admission of guilt, and compensation. It is aimed at reintegrating the offender into the community, not as much on punishing him.<sup>38</sup>

The Rome Statute sets up several ways in which the ICC could defer to state action.<sup>39</sup> The provisions, however, are rather vague about what constitutes a valid state prosecution.

It gets even more complicated when it comes to nonprosecutorial alternatives, such as mato oput, or other alternatives like truth commissions or amnesties. It is not at all clear how the provisions would work when faced with a state that wants to assert jurisdiction based on nonprosecutorial mechanisms.<sup>40</sup>

First, under Article 16, the ICC could follow a request from the UN Security Council to suspend the investigation or prosecution.<sup>41</sup> Under the Rome Statute, the Security Council has the power to make the political determination that the ICC investigation or prosecution is a threat to international peace and security.<sup>42</sup> If Kony signs a peace deal and disarms, Uganda could ask the Security Council to make an Article 16 deferral.<sup>43</sup> This method’s drawback is that it is only a

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30. *Id.* at 223.

31. *Id.*

32. *Id.*

33. *Id.* at 218.

34. See THE LORD’S RESISTANCE ARMY: MYTH AND REALITY, *supra* note 13, at Chapter 13 for a discussion of the authenticity of the concept of mato oput and other so-called traditional methods as used by various actors in the context of Northern Uganda.

35. Keller, *supra* note 2, at 224, 230.

36. *Id.* at 230.

37. *Id.*

38. See *id.* at Part II, for an extensive discussion of mato oput, including challenges in discerning support for it and in using a traditional justice mechanism like mato oput in the context of ICC crimes.

39. *Id.* at 237.

40. *Id.* at 237–39.

41. *Id.* at 238.

42. *Id.*

43. *Id.* at 238–39.

temporary measure, for one year, albeit renewable.<sup>44</sup> It is not clear that this would satisfy Kony. Moreover, the trend is shifting away from amnesty and toward accountability. Nonetheless, it is possible the Security Council could step in to halt the ICC prosecution against Kony in the interests of peace.<sup>45</sup>

Second, the ICC could determine that *mato oput* constitutes a prior proceeding that would block an accused from being tried a second time under Article 20.<sup>46</sup> Given that it is difficult to put a non-prosecutorial mechanism in the same class as trial before another court, it is unlikely *mato oput* would fall under Article 20.

Third, the ICC could determine that the case against Kony is inadmissible. Under Article 17, a case is inadmissible if:

1. the case is being or has been investigated or prosecuted by a State with jurisdiction, unless the State is unwilling or unable genuinely to do so;
2. the case is barred because the person has already been prosecuted by another court;
3. the case is not of sufficient gravity to justify prosecution.<sup>47</sup>

With regard to state investigation or prosecution, it is not clear that this would apply to a traditional justice mechanism like *mato oput*. Similarly, it is not clear that undergoing *mato oput* could constitute a prior prosecution—one that would bar the ICC from going forward—because it is not a trial by a court. Finally, it is unlikely that the ICC would determine that the LRA's crimes are not sufficiently grave given the facts.<sup>48</sup>

Thus, a close reading of Article 17 shows it is unlikely that *mato oput* would render the case against Kony inadmissible.<sup>49</sup> But there is enough ambiguity in the language that the ICC could stretch the provision to cover traditional justice such as *mato oput*, especially if paired with a truth commission.<sup>50</sup>

A fourth statutory provision is Article 53, which deals with prosecutorial discretion.<sup>51</sup> The Prosecutor could decline to prosecute if it is not in the interests

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44. *Id.* at 239.

45. *Id.* at Part III.A.

46. *Id.* at 245.

47. Rome Statute of the International Criminal Court, 12–13 (July 1, 2002), available at [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) (on file with *The University of the Pacific Law Review*).

48. Keller, *supra* note 2, at Part III.D.

49. *Id.*

50. *Id.* at Part III.D.

51. Rome Statute of the International Criminal Court, *supra* note 47, at 33.

of justice.<sup>52</sup> Specifically, the statute provides that the Prosecutor can determine there is no basis for prosecution because it “is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.”<sup>53</sup>

Again, the language is vague enough that it might encompass *mato oput*. In other words, the Prosecutor could decide that it is in the interests of justice to allow Uganda to reach a compromise with Kony that would end the conflict, even if that means promising Kony that he would not be prosecuted. This is particularly true if the victims strongly support it.<sup>54</sup>

In fact, this is the argument that some members of the Acholi tribe made to the then-Prosecutor before he sought the arrest warrants.<sup>55</sup> The argument was obviously unpersuasive. The then-Prosecutor implied that he saw Kony’s demands as extortion and blackmail—demands that must be rejected.<sup>56</sup> Nonetheless, if Kony were to sign the deal and go through the *mato oput* process, perhaps the current Prosecutor could reconsider and suspend the prosecution based on the new facts on the ground.<sup>57</sup>

### III. FURTHERING INTERNATIONAL CRIMINAL JUSTICE

Assuming the procedural avenue exists, should the ICC defer to traditional justice under any circumstances? One could take a hardline retributive justice position and conclude that the ICC can never defer to a traditional justice mechanism like *mato oput*. Anything short of prosecution in a court may be seen as insufficient. If the ICC is supposed to end impunity, then one could argue that deferral to traditional justice mechanisms like *mato oput* violates the object and purpose of the Rome Statute.<sup>58</sup> At the other extreme, one could say the ICC should defer to anything that a society deems necessary to achieve peace, short of a self-serving amnesty. I suggest that the ICC should find a principled middle ground. It should defer to alternative mechanisms when it is necessary for peace and when it can achieve some measure of justice.<sup>59</sup>

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52. Keller, *supra* note 2, at Part III.C.

53. Rome Statute of the International Criminal Court, *supra* note 47, at 33.

54. Keller, *supra* note 2, at Part III.C.

55. *Id.* at 250.

56. Mr. Luis Moreno-Ocampo, Prosecutor of the Int’l Criminal Court, Address at Nuremberg: Building a Future on Peace and Justice (June 24, 2007), available at [https://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO\\_nuremberg\\_20070625\\_English.pdf](https://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf) (on file with *The University of the Pacific Law Review*). In 2007, then-Prosecutor Moreno-Ocampo stated, “Allowed to remain at large, the criminals ask for immunity under one form or another as a condition to stopping the violence. They threaten to attack more victims. I call this extortion, I call it blackmail. We cannot yield.”

57. Keller, *supra* note 2, at Part III.C.

58. See generally Rome Statute of the International Criminal Court, *supra* note 47.

59. Keller, *supra* note 2, at Part III.D.

To determine necessity, the ICC would look at whether the alternative is truly needed to achieve peace. If Kony maintains his insistence on nonprosecutorial alternatives and continues to commit atrocities, then alternative measures like *mato oput* might be a last resort supported by most victims.<sup>60</sup>

To determine whether traditional mechanisms achieve some measure of justice, the ICC should look to the goals of the ICC.<sup>61</sup> Although ICC goals are contested, there is general agreement that the ICC is meant to further retribution, deterrence, expressivism, and restorative justice.<sup>62</sup> If traditional justice like *mato oput* can further these goals to the same extent as ICC prosecution, the ICC should defer.<sup>63</sup> At first glance, ICC prosecution appears superior to *mato oput* in achieving these four goals of international criminal justice, but there is more than meets the eye.

#### A. Retribution

Retribution typically justifies prosecution and punishment based on individual culpability: a person is prosecuted and punished because he deserves it. Retribution is generally linked to criminal prosecution, but its concern with individual culpability and punishment might be furthered by *mato oput* to some extent.<sup>64</sup>

The process of *mato oput* requires an investigation and establishment of individual responsibility.<sup>65</sup> Because it requires the offender to admit guilt and express remorse, it might be similar to prosecution in terms of culpability—particularly if Kony were to deny responsibility at trial.<sup>66</sup>

*Mato oput* might also impose punishment, albeit of a different sort. Rather than incarceration, the punishment takes the form of compensation and shaming.<sup>67</sup> To Western retributivists, this punishment is clearly insufficient compared to the thirty years or life imprisonment Kony might face at the ICC. But from the perspective of the victims, there is less enthusiasm at the idea of Kony spending the rest of his days in a distant, internationally-approved prison, with ample food and medical care. One Acholi leader, for example, has noted

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60. *See id.* at Part IV.B. (observing the strength of support for non-prosecutorial alternatives is difficult to measure and often dependent on context, as one strong proponent of *mato oput* for the LRA, David Acana (Acholi paramount chief) subsequently expressed support for the prosecution of LRA leaders in 2008); *see also* THE LORD'S RESISTANCE ARMY: MYTH AND REALITY, *supra* note 13, at 260–61 (explaining this could have been influenced by the failure of the peace process as well as the LRA's departure from Northern Uganda, allowing for a more peaceful life for the community).

61. *See generally* Keller, *supra* note 2, at 213.

62. *See generally id.*

63. *Id.* at 265.

64. *Id.* at Part IV.C.1.

65. *Id.* at 229.

66. *Id.* at 267, 269.

67. *Id.* at 229

that Kony should be in the community among those who had suffered, not in an air-conditioned prison.<sup>68</sup> The local shaming component of mato oput might be seen as greater punishment within the victim community.<sup>69</sup>

Thus, mato oput might further retributive justice in the eyes of many of the victims, although it seems that ICC prosecution would still do so to a greater extent.

### *B. Deterrence*

There is a good argument that mato oput will not deter Kony from re-offending, nor will it deter would-be rebels from committing crimes. Deterrence is premised on a rational actor model.<sup>70</sup> Those who commit atrocities are unlikely to refrain from doing so for fear of facing mato oput in the future. But the same can be said for ICC prosecution.<sup>71</sup>

Moreover, mato oput is likely to reach far more offenders than ICC prosecution, which focuses on those most responsible.<sup>72</sup> Mato oput also reintegrates offenders into the community.<sup>73</sup> Thus, on broad preventive grounds, mato oput might be more effective, especially if combined with other steps toward reconciliation like a truth commission. Overall, while mato oput is unlikely to further deterrence, it likely matches the ICC's inability to effectively deter most offenders.<sup>74</sup>

### *C. Expressivism*

Expressivism, in short, is the idea that the role of the criminal justice system is to send a message to society.<sup>75</sup> The treatment of offenders is supposed to send a message of condemnation of the act in order to inculcate moral values in society.<sup>76</sup> Mato oput clearly censures the actions of the offender, and its message is likely effectively communicated on the local level.<sup>77</sup> Mato oput might be particularly powerful because the accused is required to accept responsibility for the crime, effectively embracing the denunciation inherent in the process.<sup>78</sup> A powerless Kony, admitting guilt and drinking the bitter root in an expression of

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68. TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY 135 (2006).

69. Keller, *supra* note 2, at 268.

70. *Id.* at 272.

71. *Id.*

72. *Id.* at 271.

73. *Id.* at 277.

74. *Id.* at 273.

75. *Id.*

76. *Id.* at 274.

77. *Id.*

78. *Id.* at 275.

remorse and reconciliation, might send a compelling message.<sup>79</sup> By contrast, the expressivist message from Kony's ICC prosecution might be muffled by a long, distant criminal trial presumably followed by incarceration in a cushy prison cell. Thus, *mato oput* might advance expressivism to the same, if not a greater, extent as ICC prosecution.<sup>80</sup>

*D. Restorative Justice*

Similarly, *mato oput* might further restorative justice to the same, if not greater, magnitude as ICC prosecution.<sup>81</sup> Restorative justice is focused on reconciliation between victims and perpetrators, reintegration of former offenders, and restoration of bonds within broader society.<sup>82</sup> The *mato oput* ceremony is squarely aimed at achieving these goals. It reintegrates the offender by requiring acknowledgment and compensation on the part of the perpetrator.<sup>83</sup> It directly involves the victim reconciling with the perpetrator.<sup>84</sup> If paired with other restorative justice mechanisms like a truth commission, it would also explore the root causes of the conflict and address the North-South divide in Uganda.<sup>85</sup> Although the ICC allows victim participation to a greater extent than prior tribunals, it is not as well-suited to addressing reconciliation or reintegration within the society.<sup>86</sup>

In summary, my prior analysis of *mato oput* and the four goals of international criminal justice yielded the following tentative conclusions. *Mato oput* would be less effective, or similarly inept, at achieving retribution and deterrence. Yet, it would likely be more effective than ICC prosecution at furthering expressivism and restorative justice. Overall, *mato oput* could achieve enough "justice" that the ICC should defer where necessary to achieve peace even though traditional justice does not mimic ICC prosecution and punishment.<sup>87</sup>

IV. RECENT EVENTS

This theoretical approach to ICC deferral could be implemented by the ICC if Uganda asked the ICC to defer to its domestic proceedings, whether *mato oput*

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79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 275–76.

83. *Id.* at 277.

84. *Id.*

85. *Id.*

86. *Id.* at Part IV.C.4.

87. *Id.*

or otherwise. Kony, however, is still at large.<sup>88</sup> Dominic Ongwen, on the other hand, is no longer in hiding.<sup>89</sup> His surrender or capture could have led the ICC and Uganda to face the question of prosecution versus non-prosecutorial alternatives like *mato oput*. Instead, Ongwen is before the ICC without the ICC or Uganda ever squarely addressing the controversial issue of whether/where he should be prosecuted. Similarly, Thomas Kwoyelo is on trial in Uganda for LRA crimes without any apparent reckoning with prosecution versus amnesty.

#### A. *Dominic Ongwen*

As noted above, Ongwen is one of two surviving LRA members wanted by the ICC. The original arrest warrant listed seven counts against Ongwen: three for crimes against humanity, and four for war crimes.<sup>90</sup> After the confirmation of charges decision issued in March 2016, Ongwen faces trial on seventy counts, again based on crimes against humanity and war crimes.<sup>91</sup> The new charges include sexual/gender based crimes as well as conscription/use of child soldiers. Trial is scheduled for December 6, 2016.<sup>92</sup>

Ongwen was turned over to the ICC under unclear circumstances. Some sources indicate he turned himself over to US forces in the Central African Republic (CAR), who seem to have maintained custody.<sup>93</sup> In this recounting of events, Ugandan authorities were involved immediately to confirm Ongwen's identity, but indicated that US forces were holding Ongwen.<sup>94</sup> Several days later, Ongwen was flown to The Hague for ICC prosecution.<sup>95</sup>

Other sources state that after Ongwen left an LRA camp, he was found wandering near the CAR border by cattle herders, who took him to local forces;

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88. Aislinn Laing, *A Lord's Resistance Army Commander Goes on Trial but Joseph Kony Still Eludes Justice*, TIME (Jan. 21, 2016), available at <http://time.com/4186861/lra-kony-ongwen/> (on file with *The University of the Pacific Law Review*).

89. *Dominic Ongwen, captured LRA commander, will face murder charges in Hague*, CBCNEWS (Jan. 20, 2015), available at <http://www.cbc.ca/news/world/dominic-ongwen-captured-lra-commander-will-face-murder-charges-in-hague-1.2921159> (on file with *The University of the Pacific Law Review*).

90. Warrant of Arrest unsealed against five LRA Commanders, Case No. ICC-CPI-20051014-110 (Oct. 14, 2005), <https://www.icc-cpi.int/pages/item.aspx?name=warrant+of+arrest+unsealed+against+five+lra+commanders> (on file with *The University of the Pacific Law Review*).

91. It is beyond the scope of this Article to address how this vast expansion of charges might affect victim representation, equality of arms, or the ability of the defense to investigate the charges prior to a timely trial. See, e.g., Danya Chaikel, *What Counts against Ongwen—Effectiveness at the Price of Efficiency?* JUSTICE IN CONFLICT (Apr. 15, 2016), <https://justiceinconflict.org/2016/04/15/what-counts-against-ongwen-effectiveness-at-the-price-of-efficiency/> (on file with *The University of the Pacific Law Review*).

92. Case Information Sheet—Dominic Ongwen, ICC-02/04-01/15, (June 2016), <https://www.icc-cpi.int/uganda/ongwen/Documents/OngwenEng.pdf> (on file with *The University of the Pacific Law Review*).

93. See, e.g., Human Rights Brief, *Dominic Ongwen—ICC to Prosecute LRA Leader*, 22 No. 1 Hum. Rts. Brief 25, 26 (Spring 2015).

94. *Id.* at 26.

95. *Id.*

the local militia commander then arranged to turn him over to US Special Forces, which in turn handed him over to the Ugandan army.<sup>96</sup>

In its press release on January 20, 2015, the ICC thanked the United Nations for its role in enabling the transfer, along with the CAR, Uganda, US, Belgium, the Netherlands and the African Union (AU) for their cooperation in the transfer.<sup>97</sup> The US State Department press release “welcome[d] the transfer of Dominic Ongwen by Central African authorities” to the ICC, based on “close cooperation and consultation by the governments” of the CAR and Uganda, along with the AU and the ICC.<sup>98</sup>

Given these differing accounts, it is not clear that Uganda ever had full custody over Ongwen, though it was certainly involved. According to the Ugandan Attorney General at the time, Ongwen was in the custody of “the Ugandan Contingent of the African Union Anti-Lord’s Resistance Army Task Force,”<sup>99</sup> leaving it unclear whether this meant a transfer to Ugandan state custody. Regardless, Uganda did not formally assert jurisdiction over Ongwen or seek to prosecute Ongwen before its own courts or via traditional justice like *mato oput*.

Uganda does have a mechanism that seems designed to address this situation. Uganda created a domestic court, now called the International Crimes Division of the High Court or ICD, as envisioned in the draft peace agreement.<sup>100</sup> It has jurisdiction over international crimes, including genocide, war crimes, crimes against humanity, terrorism, human trafficking, and piracy.<sup>101</sup> According to the Ugandan Judiciary website, the ICD was intended to be part of a peace deal with the LRA but has “come to be viewed as a court of ‘complementarity’ with respect to the [ICC], thus fulfilling the principle of complementarity [in the

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96. See, e.g., Ledio Cakaj, *The Life and Times of Dominic Ongwen, Child Soldier and LRA Commander*, JUSTICE IN CONFLICT (Apr. 12, 2016), <https://justiceinconflict.org/2016/04/12/the-life-and-times-of-dominic-ongwen-child-soldier-and-lra-commander/> (on file with *The University of the Pacific Law Review*).

97. Press Release, Dominic Ongwen transferred to The Hague (Jan. 20, 2015), available at <https://www.iccpi.int/Pages/item.aspx?name=pr1084> (on file with *The University of the Pacific Law Review*).

98. Press Statement, Jen Psaki, Transfer of Dominic Ongwen to the International Criminal Court, U.S. STATE DEPT. (Jan. 20, 2015), available at <http://www.state.gov/r/pa/prs/ps/2015/01/236142.htm> (on file with *The University of the Pacific Law Review*).

99. Peter Nyombi, Statement by the Government on the Dominic Ongwen Case, UGANDA MEDIA CENTRE (Feb. 2, 2015), <http://www.mediacentre.go.ug/press-release/statement-government-dominic-ongwen-case> (on file with *The University of the Pacific Law Review*).

100. See *Frequently Asked Questions on the International Crimes Division of the High Court of Uganda*, JUSTICE LAW & ORDER SECTOR, REPUBLIC OF UGANDA, <https://www.jlos.go.ug:442/index.php/component/k2/item/536-international-crimes-division-frequently-asked-questions> (last visited June 25, 2016) (on file with *The University of the Pacific Law Review*).

101. *Id.*

Rome Statute].”<sup>102</sup> It does not, however, incorporate traditional justice as envisioned in the Juba accords.<sup>103</sup>

The ICD would seem the obvious option for Ongwen’s domestic prosecution. Although Uganda indicated the ICD is a way to implement the principle of complementarity and therefore block ICC prosecution, it may be that domestic prosecution posed complications that the Ugandan government preferred to avoid. In addition to jurisdictional issues, other complications include Ongwen’s status as a former abductee of the LRA and Ugandan amnesty laws.

According to then-Attorney General, the Honorable Peter Nyombi, prosecution before the ICD was not an option.<sup>104</sup> The Statement by the Government on the Dominic Ongwen Case under Attorney General Nyombi’s name noted that “the cross-border commission of the offenses committed by Dominic Ongwen and the fact that Uganda had already referred the situation concerning the LRA to the ICC requires that he be tried by the ICC, rather than the [International Crimes Division of the] High Court.”<sup>105</sup> This statement has broad implications, as it would seem to apply equally to Joseph Kony. It implies that Uganda would turn Kony over to the ICC if he were to surrender or be captured, which contradicts the implications in President Museveni’s prior comments that a peace deal with Kony would include Ugandan accountability measures, not ICC prosecution.<sup>106</sup>

Further, the statement noted the many actors involved (CAR, US, AU, and the Ugandan military) and indicated that their cooperative effort to turn Ongwen over to the ICC provided “international clout that requires the perpetrator be tried by the ICC, in which all the actors would have confidence.”<sup>107</sup> In addition, the decision to send Ongwen to the ICC was endorsed by all the countries in which Ongwen’s operations had taken place as well as by the AU and US.<sup>108</sup> The Attorney General also noted that any amnesty under Ugandan law would not block his prosecution at the ICC.<sup>109</sup> Thus, the Ugandan government considered the ICC the proper venue.

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102. INTERNATIONAL CRIMES DIVISION, THE JUDICIARY, THE REPUBLIC OF UGANDA, <http://www.judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html> (last visited June 25, 2016) (on file with *The University of the Pacific Law Review*).

103. SARAH M. H. NOUWEN, *COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN* 180 (2013).

104. Nyombi, *supra* note 99.

105. *Id.*

106. Keller, *supra* note 2, at 220–21.

107. Nyombi, *supra* note 99.

108. *Id.*

109. *Id.* (noting that the constitutionality of the Amnesty Act was under consideration at the Supreme Court).

Another jurisdictional issue may be that the ICC arrest warrant focused on crimes during 2004.<sup>110</sup> According to Dixon Odur, Archdiocese of Gulu, Justice and Peace Commission, the ICD may not be able to address all crimes before 2008.<sup>111</sup>

One commentator asserts another motivation for the Ugandan government's position that Ongwen must be prosecuted by the ICC: to ensure the ICC will not prosecute government officials for atrocities committed by the government during the conflict with the LRA.<sup>112</sup> President Museveni stated Ongwen had to be sent to the ICC because he was not captured in Uganda, but according to Mark Kersten, in reality, Ongwen would have been prosecuted in Uganda if that were what Museveni wanted.<sup>113</sup> Kersten asserted: "In shipping Ongwen to the ICC, however, Museveni deftly outsourced a potential political problem while, at the same time, ensuring that the ICC would continue to be dependent on his cooperation and that, in all likelihood, the government would not be targeted with prosecution."<sup>114</sup>

According to one source, Uganda initially wanted to prosecute Ongwen itself but "some feared that Ongwen's 'status as both victim and alleged author of war crimes' could have resulted in . . . a pardon [under the 2000 Amnesty law]."<sup>115</sup> These two concerns will be addressed separately: (1) Ongwen's abduction into the LRA, and its connection to calls for alternatives to prosecution; and (2) the potential application of the Amnesty Act, which will be explored in detail in the case of *Uganda v. Thomas Kwoyelo*.<sup>116</sup>

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110. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Warrant of Arrest, ¶ 30 (July 8, 2005), [http://www.legal-tools.org/uploads/tx\\_ltpdb/doc1921701\\_03.pdf](http://www.legal-tools.org/uploads/tx_ltpdb/doc1921701_03.pdf), (on file with *The University of the Pacific Law Review*).

111. Oryem Nyeko & Harriet Aloyocan, *Community Perceptions on Dominic Ongwen*, Justice & Reconciliation Project Situational Brief 4, May 2015, available at <http://justiceandreconciliation.com/wp-content/uploads/2015/05/Community-Perceptions-on-Dominic-Ongwen-2015-05-17.pdf> (on file with *The University of the Pacific Law Review*) ("In terms of the transitional justice landscape of Uganda, the proceedings against Ongwen being held before the ICC 'shed a lot of light on the credibility of the [ICD] to handle cases of such nature,' suggesting that the ICD's limited jurisdiction to try cases before its establishment in 2008 hampers it from properly addressing atrocities that were committed during the height of the LRA conflict."); see also Justice and Peace Commission, Uganda, INSIGHT ON CONFLICT, <https://www.insightonconflict.org/conflicts/uganda/peacebuilding-organisations/justice-and-peace-commission/> (last visited June 25, 2016) (on file with *The University of the Pacific Law Review*) ("The Justice and Peace Commission is a Roman Catholic initiative for peace in Uganda.").

112. Mark Kersten, *Why the ICC Won't Prosecute Museveni*, JUSTICE IN CONFLICT (Mar. 19, 2015), <https://justiceinconflict.org/2015/03/19/why-the-icc-wont-prosecute-museveni/> (on file with *The University of the Pacific Law Review*).

113. *Id.*

114. *Id.*

115. *Dominic Ongwen – ICC to Prosecute LRA Leader*, 22 HUMAN RIGHTS BRIEF 25, 26 (Spring 2015).

116. See *infra* Part IV.B.

Ongwen's status as victim and victimizer may have encouraged Uganda to pass off a controversial prosecution to the ICC.<sup>117</sup> Ongwen was kidnapped as a child, though the exact age is disputed.<sup>118</sup> Ongwen's defense argued that, as an abducted child soldier, Ongwen should not be deemed responsible and/or that he acted under duress.<sup>119</sup> In confirming charges, the ICC gave short shrift to Ongwen's abduction into the LRA, leading to criticism of the ICC rather than Uganda.<sup>120</sup>

Moreover, some community members in Uganda argue that Ongwen's status as a former abductee should protect him from prosecution and punishment.<sup>121</sup> Whether the community supports prosecution or alternative justice mechanisms is a difficult question to answer.<sup>122</sup> After the peace talks failed and a renewed military push led the LRA to flee Northern Uganda, more people were able to return home; as a result, support for offering the LRA non-prosecutorial alternatives decreased.<sup>123</sup> When the LRA poses a less immediate threat, there is less opposition to domestic or international prosecution.<sup>124</sup>

Nonetheless, some in Northern Uganda argue that Ongwen should be allowed to return home and undergo traditional justice. A prominent Ugandan organization, the Acholi Religious Leaders Peace Initiative, opposes ICC

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117. Mark Kersten, *Why the ICC Won't Prosecute Museveni*, JUSTICE IN CONFLICT (Mar. 19, 2015), available at <https://justiceinconflict.org/2015/03/19/why-the-icc-wont-prosecute-museveni/> (on file with *The University of the Pacific Law Review*) (citing political and financial cost of prosecuting someone for crimes they would not have committed if not kidnapped by the LRA).

118. Compare, Alex Whiting, *There is Nothing Extraordinary about the Prosecution of Dominic Ongwen*, JUSTICE IN CONFLICT (Apr. 18, 2016), <https://justiceinconflict.org/2016/04/18/there-is-nothing-extraordinary-about-the-prosecution-of-dominic-ongwen/> (on file with *The University of the Pacific Law Review*) (citing age as 12 while noting defense alleges it was 9.5); with Attorney General Peter Nyombi, *Statement by the Government on the Dominic Ongwen Case*, UGANDA MEDIA CENTRE (Feb. 2, 2015), available at <http://www.mediacentre.go.ug/press-release/statement-government-dominic-ongwen-case> (on file with *The University of the Pacific Law Review*) (stating Ongwen was abducted by LRA at age of 14).

119. Mark Drumbl, *Shifting Narratives: Ongwen and Lubanga on the Effects of Child Soldiering*, JUSTICE IN CONFLICT (Apr. 20, 2016), <https://justiceinconflict.org/2016/04/20/shifting-narratives-ongwen-and-lubanga-on-the-effects-of-child-soldiering/> (on file with *The University of the Pacific Law Review*).

120. *Id.* (arguing that prior ICC case law in Lubanga is inconsistent with Ongwen's confirmation of charges decision, which assumes agency and choice of Ongwen without examination of his status as former abducted child in LRA). *But see* Alex Whiting, *There is Nothing Extraordinary about the Prosecution of Dominic Ongwen*, JUSTICE IN CONFLICT (Apr. 18, 2016), available at <https://justiceinconflict.org/2016/04/18/there-is-nothing-extraordinary-about-the-prosecution-of-dominic-ongwen/> (on file with *The University of the Pacific Law Review*) (emphasizing that crimes took place "long after he became an adult" and past experience as a child soldier victim is unlikely to be significant even at sentencing).

121. *Ongwen's Justice Dilemma: Perspectives from Northern Uganda* 6, REFUGEE LAW PROJECT (Jan. 26, 2015), available at [http://www.refugeelawproject.org/files/briefing\\_papers/ONGWEN'S\\_JUSTICE-DILEMMA\\_-\\_Perspectives\\_from\\_Northern\\_Uganda\\_-\\_Dialogue\\_Report.pdf](http://www.refugeelawproject.org/files/briefing_papers/ONGWEN'S_JUSTICE-DILEMMA_-_Perspectives_from_Northern_Uganda_-_Dialogue_Report.pdf) [hereinafter *Ongwen's Justice Dilemma*] (on file with *The University of the Pacific Law Review*).

122. Keller, *supra* note 2, at 225–28.

123. *E.g.*, NOUWEN, *supra* note 103, at 158.

124. *Id.* at 158.

prosecution, arguing for the use of *mato oput*.<sup>125</sup> It contends that *mato oput* would foster restorative justice.<sup>126</sup> Its position is influenced by Ongwen's abduction, citing the failure to protect Ongwen from abduction and the need to recognize former child soldiers as among the most victimized of the conflict.<sup>127</sup>

The desire for non-prosecutorial alternatives like *mato oput* is also motivated by a desire to see other child soldiers return home, something that might be discouraged by Ongwen's prosecution.<sup>128</sup> In fact, the Prosecutor of the ICC issued a statement trying to fight this perception.<sup>129</sup> She stressed that LRA members other than Kony and Ongwen are not under arrest warrant at the ICC. Additionally, she rebutted rumors that LRA members who return home will be subject to prosecution, torture, or killing by the ICC.<sup>130</sup>

Some note that singling out Ongwen when other former child soldiers have been given amnesty is not fair.<sup>131</sup> In particular, more prominent leaders of the LRA have been given amnesty, making Ongwen—an abducted child—especially undeserving of prosecution.<sup>132</sup> One commentator cites a radio station survey and Refugee Law Project survey indicating “many people already think that Ongwen should be pardoned because he was a child at the time of his abduction.”<sup>133</sup>

Many in Northern Uganda are still waiting for their children to return from being abducted into the LRA.<sup>134</sup> Others realize their own returned children are still trying to cope with the crimes that they were coerced into committing while

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125. Travis Rejman & Baker Ochola, *Send Dominic Ongwen of the Lord's Resistance Army Home for Real Justice*, THE WORLD POST (Jan. 22, 2016), [http://www.huffingtonpost.com/travis-rejman/send-dominic-ongwen-of-the\\_b\\_9032270.html](http://www.huffingtonpost.com/travis-rejman/send-dominic-ongwen-of-the_b_9032270.html) (on file with *The University of the Pacific Law Review*).

126. *Id.*

127. *Id.*

128. *Id.*; see also Nyeko & Aloyocan, *supra* note 111, at 4 (citing a member at the Uganda Human Rights Commission's fear that Ongwen's conviction could discourage others).

129. *Message from the Prosecutor of the International Criminal Court, Fatou Bensouda, calling for defection by LRA fighters*, INTERNATIONAL CRIMINAL COURT (Apr. 1, 2016), available at <https://www.icc-cpi.int/Pages/item.aspx?name=160401-otp-stat> (on file with *The University of the Pacific Law Review*).

130. *Id.*

131. Barrie Sander, *We Need to Talk About Ongwen*, JUSTICE IN CONFLICT (Apr. 19, 2015), available at <https://justiceinconflict.org/2016/04/19/we-need-to-talk-about-ongwen-the-plight-of-victim-perpetrators-at-the-icc/> (on file with *The University of the Pacific Law Review*).

132. Rosebell Kagumire, *The Ongwen Trial and the Struggle for Justice in Northern Uganda*, JUSTICE IN CONFLICT (Apr. 14, 2015), <https://justiceinconflict.org/2016/04/14/the-ongwen-trial-and-the-struggle-for-justice-in-northern-uganda/> (on file with *The University of the Pacific Law Review*).

133. Donnas Ojok, *War Child or Warlord?*, AFRICA AT LSE, <http://blogs.lse.ac.uk/africaatlse/2015/02/23/war-child-or-warlord-the-justice-paradox-in-ongwens-icc-case/> (last visited June 25, 2016) (on file with *The University of the Pacific Law Review*); see also, Cyanne E. Loyle, *Amnesty, the ICC and Complications with the Dominic Ongwen Case*, POLITICAL VIOLENCE@ A GLANCE (Mar. 23, 2015), <https://politicalviolenceataglance.org/2015/03/23/amnesty-the-icc-and-complications-with-the-dominic-ongwen-case/> (on file with *The University of the Pacific Law Review*) (citing recent surveys in Acholiland finding victims of LRA violence support *mato oput* rather than prosecution).

134. Loyle, *supra* note 133.

with the LRA.<sup>135</sup> Furthermore, the prosecution of a former abducted child may “morally absolve the government for its failure to protect them.”<sup>136</sup>

This is not to say that opinion is uniform. To the contrary, one survey respondent stated that in Acholi society, even young children know killing is wrong.<sup>137</sup> Others noted that Ongwen should be prosecuted because he failed to take advantage of amnesty, but rather stayed and continued to commit crimes<sup>138</sup> when he could have escaped.<sup>139</sup> Many civil society respondents supported ICC prosecution for Ongwen.<sup>140</sup> The Ugandan Attorney General asserted that traditional justice mechanisms like *matu oput* can be used by LRA members who surrender, but not if they are LRA leaders or under arrest warrant by the ICC.<sup>141</sup>

The varied opinions over whether Ongwen should be prosecuted at the ICC, or at all, echo the concerns over prosecuting Kony to some extent. Bringing us back to the peace versus justice debate, there is a concern that Ongwen’s prosecution will prevent fighters from laying down their arms, parallel to fears that threatening to prosecute Kony kept him from a peace deal. The same controversy over what constitutes justice resurfaces: retributive justice focused on prosecution of Ongwen, or restorative justice featuring non-prosecutorial mechanisms like *matu oput*.

It is possible that Uganda’s action (or inaction) leading to Ongwen’s ICC prosecution could be seen as a principled choice, based on the legitimacy of the ICC, the unclear support for non-prosecutorial alternatives, and a justifiable reliance on prosecution in terms of advancing the goals of international justice. But the motivations of the Ugandan government have been called into question by some, leading to speculation that the failure to request a deferral in this case is not grounded in a judgment that prosecution at the ICC will most effectively achieve international justice or accountability. Rather, there are suspicions that the true rationale is based on a cost-benefit analysis focused on the government rather than the victims. To wit, that the Ugandan government would rather let the ICC tackle the controversial issue of how much to take into account the prior victim status of a former child soldier once he becomes an adult; and/or that the Ugandan government is manipulating the ICC into a position where state cooperation is necessary such that it will not pursue any investigations into culpability of governmental forces or officials. Avoiding the prosecution of Ongwen in the ICC also avoids another tangled web of issues illustrated by the Kwoyelo case.

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135. Kagumire, *supra* note 132.

136. *Ongwen’s Justice Dilemma*, *supra* note 121.

137. Nyeko & Aloyocan, *supra* note 111, at 2.

138. *Id.*

139. *Ongwen’s Justice Dilemma*, *supra* note 121.

140. Nyeko & Aloyocan, *supra* note 111, at 4.

141. Nyombi, *supra* note 99.

B. Thomas Kwoyelo

Some of those who support ICC prosecution do so because they fear that if Ongwen returned to Uganda, he would be entitled to amnesty. Amnesty has been given to a number of other LRA members, including more high-ranking leaders, who are now living freely in Uganda.<sup>142</sup> Even President Museveni himself apparently indicated shortly after the collapse of Juba that “LRA leaders who had indicated a willingness to surrender, Dominic Ongwen and Okot Odhiambo, could be eligible for amnesty.”<sup>143</sup>

Uganda has repeatedly renewed a broad amnesty law. It provides amnesty to Ugandans who have engaged in acts of war or armed rebellion against the government of Uganda since January, 1986.<sup>144</sup> More than 27,000 Ugandans have received amnesty since 2000.<sup>145</sup> The act has been extended and appears to be currently in force.<sup>146</sup> Amnesty is supported by many Northern Ugandans who want their abducted family members to come home without facing prosecution for crimes they may have been coerced or brainwashed into committing.<sup>147</sup>

The amnesty issue has become quite complicated. One captured alleged LRA leader not wanted by the ICC, Thomas Kwoyelo, sought amnesty in January, 2010.<sup>148</sup> Kwoyelo attests that he was abducted by the LRA in 1987 at age 13. He was captured by Ugandan forces in 2008.<sup>149</sup> Given the language of the Amnesty Act and prior practice, Kwoyelo’s amnesty could have been granted as a matter of course. But the government (specifically, the Directorate of Public Prosecutions, or DPP) effectively rejected his request. Kwoyelo was initially charged with 12 counts under the Geneva Conventions Act, but the indictment was later amended at the ICD to “53 counts of war crimes under the Geneva Conventions Act, with alternative charges including murder, kidnapping with intent to murder, attempted murder and robbery under the Penal Code Act Cap 120.”<sup>150</sup>

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142. Kagumire, *supra* note 132.

143. Gregory S. Gordon, *Complementarity and Alternative Justice*, 88 OR. L. REV. 621, 623 (2009).

144. *Uganda Amnesty Act, 2000*, INTERNATIONAL COMMITTEE OF THE RED CROSS (2000), available at [https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/7d2430f8f3cc16b6c125767e00493668/\\$FILE/Ugandan+Amnesty+Act+2000.pdf](https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/7d2430f8f3cc16b6c125767e00493668/$FILE/Ugandan+Amnesty+Act+2000.pdf) (on file with *The University of the Pacific Law Review*).

145. Samuel Okiror, *Forgive and forget? Amnesty dilemma haunts Uganda*, IRIN (June 12, 2015), available at <http://www.irinnews.org/report/101625/forgive-and-forget-amnesty-dilemma-haunts-uganda> (on file with *The University of the Pacific Law Review*).

146. *Id.*

147. *Id.*

148. Thomas Kwoyelo alias Latoni v. Uganda (Const. Pet. No. 036 of 2011 (reference)) [2011] UGCC 10 (22 September 2011) (Uganda), available at <http://www.ulii.org/ug/judgment/constitutional-court/2011/10/> (last visited June 25, 2016) (on file with *The University of the Pacific Law Review*).

149. *Id.*

150. *See Justice at Cross Roads? A Special Report on the Thomas Kwoyelo Trial*, JUSTICE LAW & ORDER SECTOR, REPUBLIC OF UGANDA (2011), available at <https://www.jlos.go.ug:442/index.php/news-media-events/newsroom/news-archive/item/200-justice-at-cross-roads-a-special-report-on-the-thomas-kwoyelo-trial>

This seems in direct conflict with the routine application of the Amnesty Act, as Kwoyelo was not excluded.<sup>151</sup> In fact, on September 22, 2011, the Ugandan Constitutional Court initially ruled for Kwoyelo when he challenged the failure to award him amnesty.<sup>152</sup> The Constitutional Court found a violation of equal treatment under the Amnesty Act.<sup>153</sup> The Constitutional Court rejected the DPP's argument that the Amnesty Act is unconstitutional.<sup>154</sup> It noted that the DPP could still prosecute persons declared ineligible for amnesty under a 2006 amendment to the act.<sup>155</sup>

The Ugandan Supreme Court, however, recently harmonized the Amnesty Act with the prosecution of Kwoyelo.<sup>156</sup> Rejecting the claim that the Amnesty Act was unconstitutional, it found that the act was proper but that amnesty could be withheld from those who committed certain crimes.<sup>157</sup> Specifically, the act covers only crimes committed in support of rebellion, which the Supreme Court determined excluded not only personal crimes, but also crimes against humanity, war crimes, and grave breaches of the Geneva Conventions, such as attacks against civilians.<sup>158</sup> The Supreme Court also found that the Amnesty Act does not violate Uganda's duties under international law.<sup>159</sup>

The Supreme Court specifically referred to the Juba agreements, noting "both the Government and the Lord's Resistance Army fully understood that there

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(on file with *The University of the Pacific Law Review*) (noting that according to Sarah Nouwen, Kwoyelo was first charged with crimes allegedly committed during his time with the LRA in June 2009); see also NOUWEN, *supra* note 103, at 215. The Supreme Court opinion and Ugandan government report on Kwoyelo do not address this. According to Human Rights Watch, the initial charges in June 2009 were "under Uganda's penal code." *Thomas Kwoyelo's trial before Uganda's International Crimes Division*, HUMAN RIGHTS WATCH (July 2011), <https://www.hrw.org/news/2011/07/07/uganda-qa-trial-thomas-kwoyelo> (on file with *The University of the Pacific Law Review*). For a discussion of how the prohibition on retroactivity blocked charges under the ICC Act 2010, see NOUWEN, *supra* note 103, at 199–206.

151. See NOUWEN, *supra* note 103, at 215 (explaining that Parliament rejected Ministry of Internal Affairs' request to exclude from amnesty Joseph Kony, Dominic Ongwen, Okot Odhiambo, and Thomas Kwoyelo); see also Luke Moffett, *Complementarity's Monopoly on Justice in Uganda: The International Criminal Court, Victims and Thomas Kwoyelo*, 16 INT'L CRIM. L. REV. 503, 514 (2016) (explaining 2010 application to disqualify Joseph Kony, Dominic Ongwen, Okot Odhiambo, and Thomas Kwoyelo was opposed by Northern Ugandans in Parliament).

152. *Thomas Kwoyelo alias Latoni v. Uganda*, *supra* note 148.

153. *Id.* at 18.

154. *Id.* at 10.

155. *Id.* at 16; see also *Justice at Cross Roads? A Special Report on the Thomas Kwoyelo Trial*, JUSTICE LAW & ORDER SECTOR, REPUBLIC OF UGANDA (2011), <https://www.jlos.go.ug:442/index.php/news-media-events/newsroom/news-archive/item/200-justice-at-cross-roads-a-special-report-on-the-thomas-kwoyelo-trial> (on file with *The University of the Pacific Law Review*).

156. *Uganda v. Kwoyelo* (Constitutional Appeal No. 01 of 2012) [2015] UGSC 5 (8 April 2015), opinion of Justice B.M. Katureebe, joined by Justices Jotham Tumwesigye, Esther Ksaakye, G.M. Okello, CNB Kitumba, available at <http://www.ulii.org/ug/judgment/supreme-court/2015/5/> (on file with *The University of the Pacific Law Review*).

157. *Id.*

158. *Id.* at 30, 41.

159. *Id.* at 43, 63.

would be accountability by certain individuals who may have committed certain criminal acts.”<sup>160</sup> Although the final agreement was not signed by Kony, the Supreme Court looked to it as evidence of the intentions of the parties; in particular, for the principle that “individuals should take personal responsibility for grave breaches of the law” while being given due process of law.<sup>161</sup> As a result, “none of the parties envisaged that [the Amnesty Act] granted amnesty for grave crimes. . . . The International Crimes Division of the High Court seems to have been created as a consequence of this.”<sup>162</sup>

The Supreme Court rejected Kwoyelo’s argument that he was treated unfairly because other LRA commanders had been given amnesty.<sup>163</sup> It noted Kwoyelo did not assert that he and other LRA commanders had committed similar crimes; the Supreme Court further assumed that the DPP must have determined in those cases that amnesty did apply.<sup>164</sup> It also noted that Kwoyelo did not show that he had been discriminated against in any way.<sup>165</sup>

The Supreme Court also addressed the peace versus justice debate.<sup>166</sup> It noted that impunity would not bring peace, but rather those who committed international crimes must first be prosecuted, while “reconciliation and pardon mechanisms” may be put in place after trial.<sup>167</sup> The Supreme Court stated that a peace deal between the LRA and the government “would illustrate the desire to have peace based on granting amnesty for war or rebellion, while at the same time demanding accountability by individuals for grave crimes committed against the population.”<sup>168</sup> Echoing the words of former ICC Prosecutor Luis Moreno-Ocampo,<sup>169</sup> the Court stated, “Peace based on impunity by people who may wish to hold the rest of society hostage and blackmail cannot be the peace envisaged in the Constitution.”<sup>170</sup>

Kwoyelo’s trial was supposed to start on May 3, 2016, but has been repeatedly pushed back.<sup>171</sup> In August, the court adjourned a pre-trial hearing until

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160. *Id.* at 44.

161. *Id.* at 45.

162. *Id.* at 46.

163. *Id.* at 52.

164. *Id.*

165. *Id.* at 56.

166. *Id.* at 62.

167. *Id.* at 47.

168. *Id.* at 63.

169. Luis Moreno-Ocampo, *Building a Future on Peace and Justice*, ICC (June 24, 25, 2007), available at [https://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO\\_nuremberg\\_20070625\\_English.pdf](https://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf) (on file with *The University of the Pacific Law Review*).

170. *Uganda v. Kwoyelo* (Constitutional Appeal No. 01 of 2012) [2015] UGSC 5 (8 April 2015), *supra* note 156, at 62.

171. Sharon Nakandha, *The Kwoyelo Case at the ICD: The Realities of Complementarity in Practice*, INTERNATIONAL JUSTICE MONITOR (May 5, 2016), <http://www.ijmonitor.org/2016/05/the-kwoyelo-case-at-the-icd-the-realities-of-complementarity-in-practice/> (on file with *The University of the Pacific Law Review*) (delay to July); Commentary, *Kwoyelo Trial Postponed (Again) in Ugandan Court: Causes and Ramifications*,

September 21, 2016 because of issues with the disclosure of evidence and notice of the hearing to Kwoyelo's attorneys.<sup>172</sup> In September, Kwoyelo's lawyers challenged the judge presiding over the pre-trial on the ground that the judge is not part of the ICD of the High Court.<sup>173</sup> After the judge refused to recuse herself because High Court judges have jurisdiction on all cases, the defense indicated it would appeal.<sup>174</sup> Even if this matter is resolved expeditiously, other pre-trial issues may remain.

The delays have raised questions about the fairness of the trial. According to the Ugandan Supreme Court, Kwoyelo was captured in 2005 and sought amnesty in 2010.<sup>175</sup> He has remained in custody even though, based on the Constitutional Court's ruling for amnesty, he should have been released during 2011-2015.<sup>176</sup> There are reports that Kwoyelo's appeal for his release was postponed to July 18, 2016 due to a lack of funds to hold the hearing.<sup>177</sup> Kwoyelo has also raised concerns about lack of resources for his defense team.<sup>178</sup>

According to commentary by the International Justice Monitor, there are other concerns regarding Uganda's ability to carry out the trial.<sup>179</sup> The new Rules of Procedure have been passed and are being used, although they are not formally in force.<sup>180</sup> The ICD has only ad hoc procedures and limited funds for outreach and witness relations; the Registrar of the ICD indicated that the delay in the trial

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INTERNATIONAL JUSTICE MONITOR (July 22, 2016), available at <http://www.ijmonitor.org/2016/07/kwoyelo-trial-postponed-again-in-ugandan-court-causes-and-ramifications/> (on file with *The University of the Pacific Law Review*) (delay to August).

172. Lino Owor Ogora, *New Lawyers Appointed as Kwoyelo Pre-Trial Hearing is Adjourned to September*, INTERNATIONAL JUSTICE MONITOR (Aug. 24, 2016), <http://www.ijmonitor.org/2016/08/new-lawYERS-APPOINTED-AS-KWOYELO-PRE-TRIAL-HEARING-IS-ADJOURNED-TO-SEPTEMBER/> (on file with *The University of the Pacific Law Review*).

173. Julius Ocungi, *Kwoyelo's lawyers question legality of presiding judge*, MONITOR (UGANDA) 2016 WLN 28825684 (Sept. 22, 2016).

174. *Id.*

175. *Uganda v. Kwoyelo* (Constitutional Appeal No. 01 of 2012) [2015] UGSC 5 (8 April 2015), *supra* note 156, at 2. Other sources indicate Kwoyelo was captured in 2008. See, e.g., Mark Schenkel, *International Crimes at Home*, WORLD POLICY BLOG (Dec. 1, 2015), <http://www.worldpolicy.org/blog/2016/02/10/international-crimes-home> (on file with *The University of the Pacific Law Review*) (article originally published in the journal *Good Governance Africa*).

176. Otilia Anna Maunganidze, *Uganda: Kwoyelo in the Dock*, INSTITUTE FOR SECURITY STUDIES (Apr. 15, 2016), available at <https://www.issafrica.org/iss-today/kwoyelo-in-the-dock-better-justice-delayed-than-no-justice-at-all> (on file with *The University of the Pacific Law Review*); see also Reta E. Raymond, *When Two Elephants Fight, It Is the Grass That Suffers: Proposed Amnesty Legislation for Peace and Justice*, 40 SYRACUSE J. INT'L L & COM. 407, 419 (2013) (discussing fair trial concerns given Kwoyelo's length in detention, lack of access to counsel/funding and translation).

177. *Ex-LRA's commander Kwoyelo trial flops in Gulu*, NEW VISION (May 4, 2016), [http://www.newvision.co.ug/new\\_vision/news/1423810/-lras-commander-kwoyelo-trial-flops-gulu](http://www.newvision.co.ug/new_vision/news/1423810/-lras-commander-kwoyelo-trial-flops-gulu) (on file with *The University of the Pacific Law Review*).

178. Maunganidze, *supra* note 176.

179. Nakandha, *supra* note 171; see also Moffett, *supra* note 151, at 518-19 (discussing draft rules of ICD).

180. Nakandha, *supra* note 171.

is “because the court is still struggling to mobilize funding to carry out outreach with victim communities prior to restarting the trial.”<sup>181</sup> Due to a lack of resources, the ICD is seeking interns and volunteers for critical functions related to victims, witnesses, and outreach.<sup>182</sup> Although the Registrar has indicated the prosecution should seek witness protection measures from the government, it appears that a formal witness protection program is not yet in place.<sup>183</sup> Other resource issues include infrastructure.<sup>184</sup> Kwoyelo’s initial appearance was overcrowded, leading the ICD to seek ICC help in televising future proceedings.<sup>185</sup> This request seems beyond the scope of ICC assistance in general, all the more so given that Kwoyelo has never even been under arrest warrant by the ICC.

The Kwoyelo case is also being watched closely to determine whether it discourages other LRA fighters from returning.<sup>186</sup> It is not clear if the prosecution of Kwoyelo is the start of a trend or an aberration. The case of Caesar Acellam is often contrasted with Kwoyelo.<sup>187</sup> According to some reports, when Acellam was captured in 2012, the DPP brought charges against him and an arrest warrant was issued; but the Ugandan army reportedly did not turn over Acellam, who was providing information on the LRA to the forces in Northern Uganda.<sup>188</sup> It appears that Acellam was granted amnesty in 2015.<sup>189</sup>

It is possible that the more recent Supreme Court decision will clear the way for more prosecutions in the future. Prior to the decision, the head of Uganda’s Amnesty Commission indicated his belief that there was no choice but to grant amnesty to those who seek it.<sup>190</sup> The Supreme Court decision may have made clear that amnesty can be withheld if the DPP presses charges before the ICD. The difficulties seen in Kwoyelo’s trial to date, however, may discourage further prosecutions. At the time of this writing, the ICD trial had yet to commence.

There does not seem to be a coherent or well-developed strategy for choosing between prosecution, whether ICC or state, and amnesty. In discussing Kwoyelo’s prosecution, for example, Sarah Nouwen argues that there was no clear policy regarding the application of the Amnesty Act to Kwoyelo.<sup>191</sup> Rather,

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181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*; see also Moffett, *supra* note 151, at 523 (noting victims were literally squeezed out in that overcrowding left most victims in the doorway or outside the courtroom).

186. Alexis Okeowo, *Thomas Kwoyelo’s Troubling Trial*, THE NEW YORKER (Jul. 20, 2012), available at <http://www.newyorker.com/news/news-desk/thomas-kwoyelos-troubling-trial> (on file with *The University of the Pacific Law Review*).

187. Schenkel, *supra* note 175.

188. *Id.*

189. Okiror, *supra* note 145.

190. *Id.*

191. NOUWEN, *supra* note 103, at 216.

the motivation seemed to be tied to the fact that the ICC Review Conference was soon to be held in Uganda. According to one prosecutor: “The ICC Review Conference put Uganda in the spotlight; then it is not good to grant an amnesty.”<sup>192</sup> Even the arguments before the Constitutional Court to strike down the Amnesty Act as unconstitutional were apparently not part of an official strategy, as the Attorney General and Deputy Attorney General apparently did not approve the argument in advance.<sup>193</sup> In sum, “[t]he prosecution of Kwoyelo was prompted by opportunism rather than law or policy.”<sup>194</sup> The desire to “make an example of Kwoyelo” to show the ICD was taking action may have abated now that the ICD’s caseload includes active terrorism cases.<sup>195</sup>

The most significant remaining question is what impact the prosecution of Kwoyelo might have on Kony. It seems likely it will further discourage Kony from entering into any peace deal that involves his surrender. Kony was unwilling to sign the peace deal when its language was ambiguous as to whether he would face state prosecution or alternative justice mechanisms like *mato oput*.<sup>196</sup> Subsequent practice and case law indicate that it is improbable that Kony would receive amnesty for all his crimes. More likely, Kony would be prosecuted before the ICD if he were not turned over to the ICC. Given the political considerations and resource issues, it seems more likely the Ugandan government would outsource the prosecution to the ICC, thereby saving it the costs and likely ensuring the culpability of government actors would not be addressed by the ICC. All of this seems to be a moot point, however, as Kony’s actions since the peace negotiations do not indicate any genuine interest in a peace process with Uganda. Skepticism was warranted in 2008.<sup>197</sup> It is even more plausible now, given Kony’s resumption of atrocities, albeit with a depleted force.<sup>198</sup>

Although it “may seem that little was lost” when it comes to Kony, the impacts of Uganda’s approach may nonetheless undermine broader transitional justice for Uganda.<sup>199</sup> The Ugandan government has apparently not made significant progress in implementing other types of restorative justice

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192. *Id.* at 215.

193. *Id.* at 223–24.

194. *Id.* at 221.

195. *Id.* at 233.

196. Keller, *supra* note 2, at 218–22.

197. *Id.* at 221.

198. Ronan & Dougan, *supra* note 21; *see also* LRA CRISIS TRACKER REPORTS, <https://reports.lracrisistracker.com/> (last visited June 25, 2016) (on file with *The University of the Pacific Law Review*). This is not to say that Kony was necessarily uninterested in a peace process at the time of the Juba accords. Rather, the motivations in play at that time may no longer exist, and his trust in Uganda as a partner in peace may be even more diminished after the collapse of the last peace process. THE LORD’S RESISTANCE ARMY: MYTH AND REALITY, *supra* note 13, at 211–12, 222 (discussing reasons to enter Juba talks other than to buy time to rearm and regroup, noting Ugandan denials of preparing military action against LRA just before launching attack, and providing statistics on LRA atrocities in first ninth months after collapse of peace talks).

199. NOUWEN, *supra* note 103, at 237.

mechanisms.<sup>200</sup> According to one commentator, the Ugandan government is not interested in truth-telling, for fear of its own members being accused and for fear of costly reparations.<sup>201</sup> Sarah Nouwen indicates that the cabinet did not allow transitional justice instruments to be implemented even though they had been part of the Juba accords.<sup>202</sup> Nouwen contends that aspects of the peace deal “that involved burdens on the state and were unlikely to be funded by donors, for instance reparations, were ignored.”<sup>203</sup> She concludes: “When other options, such as militarily defeating the LRA, providing an amnesty or handing over the LRA leadership to the ICC promise to be more convenient, the [Ugandan government] is likely simply to discard its newfound commitment to domestic legal accountability and leave lawyers without a role to play.”<sup>204</sup>

Victims remain uninformed and hold possibly false expectations, such as believing that ICC prosecution of Ongwen will yield significant reparations.<sup>205</sup> While reparations may be possible through the Trust Fund for Victims in the event Ongwen is convicted, it seems unlikely they will receive significant compensation given the number of victims and inadequacy of the resources.<sup>206</sup> This could turn victims against the ICC, possibly leading to greater support by victims of Ugandan traditional justice mechanisms. On the other hand, although the Ugandan government has launched some aid programs in the North, to date the government has not offered the anticipated comprehensive reparations program.<sup>207</sup> Moreover, recent work by Luke Moffett indicates that in addition to reparations, victims seek punishment of those most responsible from the LRA and Ugandan military.<sup>208</sup> Finally, the position of Ugandan victims and the government may shift if the LRA resumes significant activity in Northern Uganda.

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200. See generally Michael Otim and Kasande Sarah Kihika, *On the Path to Vindicate Victims' Rights in Uganda*, ICTJ (June 2015), available at [https://www.ictj.org/sites/default/files/ICTJ-Briefing-Uganda-TJProcess-2015\\_0.pdf](https://www.ictj.org/sites/default/files/ICTJ-Briefing-Uganda-TJProcess-2015_0.pdf) (on file with *The University of the Pacific Law Review*) (as of June 2015, no establishment of truth-seeking process or victim reparations; draft national transitional justice policy not yet adopted).

201. NOUWEN, *supra* note 103, at 168–69.

202. *Id.* at 168.

203. *Id.* at 237.

204. *Id.* at 177–78.

205. Nyeko & Aloyocan, *supra* note 111, at 5.

206. See generally Trust Fund for Victims, Financial Information, available at <http://www.trustfundforvictims.org/financial-information> (last visited June 26, 2016) (on file with *The University of the Pacific Law Review*); Press Release, *Uganda: Q&A on Dominic Ongwen at the ICC*, FIDH (January 20, 2016), <https://www.fidh.org/en/issues/international-justice/uganda-q-a-on-dominic-ongwen-at-the-icc> (on file with *The University of the Pacific Law Review*) (“As of January 12, 2016, at least 2026 victims have been granted the right to participate in the Ongwen confirmation of charges hearing.”).

207. Moffett, *supra* note 151, at 516.

208. *Id.* at 520.

V. CONCLUSION

The Ongwen and Kwoyelo cases could have presented opportunities for Uganda and the international community to grapple with serious questions raised by different theoretical approaches to peace and justice. Yet, neither seems to have yielded a well thought-out approach or strategy. It remains to be seen whether future opportunities will present themselves, and, if so, whether the Ugandan government and international community are able to take advantage of them to advance peace with justice.