The Agreement and the Annexure on Accountability and Reconciliation between the Government of Uganda and the Lord’s Resistance Army/Movement -- a Legal and Pragmatic Commentary

by Pål Wrange

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I. Introduction

The Juba peace talks between the Government of Uganda (Government of Uganda) and the Lord’s Resistance Army/Movement (LRA/M) were held between 14 July 2006 and 25 March 2008. These talks, mediated by Vice-President Riek Machar of the Government of Southern Sudan, were an effort to end a two-decades long conflict in northern Uganda, which had not only killed, maimed and raped thousands of people and turned two million people into internally displaced persons (IDPs), but also exacerbated already existing tensions and inequalities between northern and southern Uganda.

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This text has been developed from a number of briefs and opinions written during 18 months of consultancy for the Embassy of Sweden in Kampala. They have been presented in various fora – including for Ugandan judges and legislators and for development partners. I would hereby like to thank numerous interlocutors for helpful comments, and special thanks are due to Sarah Nouwen, Professor Joseph Kakooza, Marieke Weinda, Joseph Manoba, Moses Adrilo, Katherine Liao and Barney Aftalo.

This article contains the views of its author, but does not necessarily reflect the positions of the Embassy or of the Swedish Ministry for Foreign Affairs.

2 It is of course not the case that the areas south and west of the Victoria Nile are uniformly more prosperous and more favoured than those to the north and the east, but overall inequalities are certainly manifest. Furthermore, there are a number of criss-crossing conflicts and resentments between regions and subregions, not least within the “Greater North”, but the image of a north-south divide is widespread, and regardless of the fact that it is an oversimplification, that image has a significance in itself.
The Final Peace Agreement is yet to be signed, allegedly due to difficulties on the part of LRA leader Joseph Kony regarding the arrest warrants of five (now three) LRA leaders by the International Criminal Court (ICC). Yet, the third agreement on Accountability and Reconciliation (the Agreement) of 29 June, 2007, and its Annexure (the Annexure) of 19 February, 2008, were specifically designed to deal with the ICC issue. The Agreement and the Annexure (henceforth: the A&R accords) are premised on the principle of complementarity in the Rome Statute of the ICC, which briefly says that a national jurisdiction has the prerogative to investigate and prosecute a case if that State is both willing and able to do so. The parties have agreed that mechanisms will be created allowing Uganda to conduct such investigations and prosecutions against the leaders of the LRA in order to enable the Government of Uganda to make a complementarity challenge before the ICC so that the arrest warrants can be “lifted”. In order to make that possible, the Government of Uganda would also have to exclude the indicted leaders from the application of the Amnesty Act, which at present gives amnesty to all rebels who report to Ugandan authorities, renounce rebellion and surrender their weapons.

The A&R accords go further than to just address the issue of the arrest warrants, though, and they do in fact provide an ambitious set of mechanisms for bringing accountability and reconciliation to the war-torn areas of northern Uganda and to the country as a whole. The two accords erect the framework for criminal justice prosecutions and proceedings, the skeleton of what appears to be a Truth and Reconciliation Commission (TRC) (covering truth-telling, historical analysis, etc), as well as provide for reparations (very vaguely) and the use of traditional justice (still undeveloped). The implementation will have to include substantial and procedural legislation as well as the creation of institutions and the provision of resources to these institutions.

The A&R accords are in force, but apart from a few provisions, the formal implementation is dependent on the signing and entry into force of the Final Peace Agreement (FPA). Nevertheless, the Government of Uganda is preparing for the implementation of the A&R accords, or at least large parts of them. At present, determined work is taking place within the framework of JLOS (the Justice, Law and Order Sector of the Government of Uganda). It is planned that drafts will be subjected to consultations and thereafter presented to Cabinet. While some have criticized the pace of implementation as being “less than breathtaking”, one must also appreciate the considerably technical as well as conceptual difficulties in this exercise. The commitment to go ahead is commendable, since the two accords are in general very useful, and their implementation would almost certainly mean a great improvement in the situation in many respects.

The A&R accords are ambitious in scope but vague and sometimes ambiguous in the details. While the Annexure answers some of the questions raised by the Agreement, many have been left for the implementing stage. This is understandable to a large extent, since the issues were quite complex, and since it is for Parliament and not for the delegations to legislate. Hence, the accords are far from always clear, and precision and elegance of drafting was not always a priority; in fact, to many observers, it was almost a miracle that the parties could agree to any text at all (the success in that respect should probably be accredited in no small

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3 Two of them – Raska Lukwiya and Vincent Otti – have since died, but the ICC has maintained the arrest warrant of Otti, since his death had not been confirmed in a way that satisfies the Court. A request from the Prosecutor to withdraw the warrant on Otti has recently been submitted.

4 The accords can be found at www.beyondjuba.org/peace_agreements.php, visited 20 March 2009.

5 The term “indicted” is not included in the Rome Statute, but it is generally held that an ICC arrest warrant means that the persons covered by the warrant would have been indicted under a criminal law system which has that institution.

6 Section 4, the Amnesty Act, Cap 294.
measure to the Mediator and his team). The Agreement in particular is difficult to navigate, especially when it comes to the provisions on formal criminal justice, while the Annexure is more logical in its outline (though not always clearer in its content). Since the Agreement requires more commentary than the Annex, I will refer more often to the former accord, and unless I write otherwise, references to clauses of the accords refer to the Agreement.

I have in this analysis benefitted from a commentary by the mediator’s legal advisor Barney Afako, whose hand was present in most if not all of the provisions of the accords, as well as from the mediator’s guidelines following the Agreement. Neither of these two documents carries any authority as such, but they provide insight into the intentions of the parties, and the understandings of the mediator.

Another very important document is the report from workshop at Fairway Hotel on 6-7 May, 2008, which intended to clarify for the LRA the implementation of some crucial aspects of the accords. The work-shop was attended by key persons in the negotiating delegations, the mediator’s team, the affected communities, the governmental agencies tasked with the implementation of the accords, civil society and experts.

It has to be noted here that the Agreement has primacy over the Annexure, in that the Agreement has to be implemented in full. This does not, however, prevent the Annexure from going further than the Agreement, as long as no provision of the Annexure prevents the implementation of the Agreement. I have not discovered any glaring inconsistencies between the two texts, but there might be discussions concerning some issues, foremost the forum for prosecutions of state actors, and double jeopardy, as will be seen later.

This analysis will focus on the accords as such, with comments based on international law and, sometimes, on Ugandan law -- the latter with the important caveat that the author is not an expert on the Ugandan legal system.

II. Purpose of the agreement -- preamble and other general and horizontal provisions

The preamble of the Agreement (the Annexure has no preamble) sets out the purpose of the Agreement: to prevent impunity, to promote redress, to promote reconciliation and to achieve peace. The second paragraph also clarifies that the goal is “lasting peace with justice” (emph. added) – evidently a nod to the peace versus justice debate triggered by the ICC indictments.

As mentioned, the accords contain a number of different mechanisms, which are often explicitly or implicitly subsumed under other terms of the accords. This terminology is important, though ambiguous and partly quite original, as far as can be

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9 The mediator not being a party, his views (and those of his team) have no standing in the hierarchy of sources. However, they often constitute good policy advice, and they can also contribute to an understanding of what the parties meant.


11 Clause 1 of the Annexure. Cf also Clauses 14.2 and 15.1 of the Agreement.

ascertained. According to Clause 1, the term “alternative justice mechanisms” covers not only traditional mechanisms but any mechanism that is “not currently administered in the formal courts” of Uganda. Clause 5.3 of the Agreement provides that the alternative justice mechanisms shall consist of traditional justice mechanisms, as well as “alternative” mechanisms or features within the formal proceedings, such as “alternative sentences”. In addition, there is the term “formal” which is used in several places in the Agreement, for instance in Clause 4.2, which speaks of “prosecutions and other formal accountability proceedings”. Clause 6 is headed “Formal Justice Processes”. “Formal justice process” is an established term, as is “alternative justice mechanism”, whereas I have not found any occurrences of the term “formal accountability proceeding” apart from in the accords. “Formal process” covers, according to Barney Afako, processes driven by the state, like courts, prosecutions and a truth-telling body. Perhaps “proceeding” – which often refers to trials but could also cover investigations -- is a narrower term than “process”, which in its turn might be narrower than “mechanism”, which appears to include also the institutions and the substantive rules. Perhaps “justice” is wider than “accountability”, perhaps it is vice versa or perhaps they overlap. I have here tried to develop what the chosen terms mean, or might mean. I will return to this terminology in more detail in the discussion on personal jurisdiction (see below, section III.A.2); for the purpose of that later discussion, it should be noted that I believe it doubtful whether the lines delimiting the “left” perimeter of, respectively, “alternative justice mechanism” and “special justice process” should coincide.

<table>
<thead>
<tr>
<th>Alternative justice mechanisms (Clauses 1, and 5.3)</th>
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<tr>
<td>Formal justice processes</td>
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<td>Formal accountability proceedings (4.2)</td>
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<td>Existing justice processes</td>
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It is obvious that the relation between the various mechanisms (existing and new formal criminal and civil justice processes, traditional justice mechanisms, truth-telling, historical analysis, reparations) is a delicate matter, as will be discussed in more detail later. One aspect will be commented upon here, though. The agreement seems to proceed from the fair idea that although accountability and reconciliation are discrete concepts, there is no firm line between accountability and reconciliation mechanisms; even formal justice mechanisms may contribute to reconciliation, while traditional, conciliatory mechanisms must have some element of accountability. Consequently, Clause 3.2 of the Agreement explains that even accountability processes shall be conducted in such a way as to promote reconciliation, and the

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13 This term has been used in some other contexts, such as Timor Leste, DRC Rwanda (traditional gacaca courts). Google search 12 December, 2008.

14 Google search 12 December, 2008.

15 Fairway, supra note 10, 10.

16 Including in the Rome Statute; cf Article 17.

17 For example, both “justice” and “accountability” can be used in the context of traditional processes, while “accountability” is a term that can be appropriate also in a political context, where leaders are (or should be) accountable to their constituencies. Still, Clause 4, headed “Accountability”, does deal mainly with formal processes before courts of law, although Clause 4.4 could arguably cover also other mechanisms.

18 The words “in the context of recovery from the conflict” may constitute a caveat or a condition (or perhaps both) to the promotion of reconciliation in Clause 3.2. Firstly, they may explain that the reconciliatory aspect of the foreseen accountability proceedings are peculiar for this context, and that it is not necessarily the view of the parties (the Government of Uganda, most importantly) that the promotion of reconciliation is a necessary feature of all accountability procedures. Secondly, these words may condition the promotion of reconciliation on this context, which means that if there is no such context, accountability procedures will take a more conventional route.
fifth preambular paragraph invokes the duty of the courts of Uganda to promote reconciliation. Article 126(2) of the Constitution provides that courts in both civil and criminal matters shall promote reconciliation.\(^{19}\) It appears that as far as criminal matters are concerned, the main feature of existing Ugandan law that might promote reconciliation is community service.\(^{20}\) Whether Clause 3.2 necessitates further changes in Ugandan criminal procedure has not been ascertained at this stage, but some related issues will be dealt with in the context of traditional justice in Section V.

It was an important objective for many of the drafters that the A&R mechanisms should provide finality, so that the conflict can be laid to rest, both at the individual and at the societal level. Clause 3.9 of the Agreement provides that the procedures shall “address the full extent of the offending conduct”. However, two questions arise. Firstly, does that mean that all crimes, that a person might have committed, have to be investigated and prosecuted when that person is charged in a formal criminal process?\(^{21}\) (See further section III.B on prosecutions.)

Secondly, and probably in the same spirit, Clause 3.9 states that there may be a cut-off date for the proceedings. This is sensible, but not totally unproblematic. It might, for instance, be the case that a person’s participation in crimes might be revealed only after such a cut-off date. At least in cases where the suspected culprit concerned has acted in bad faith and not cooperated fully with the process, there will be good reasons for opening a case against him or her even when the time-limit has passed.\(^{22}\)

Clause 2.2 of the Agreement sets the temporal jurisdiction of the accountability processes to the period of the conflict between the parties. This excludes events that took place before the LRA was formed (the LRA was allegedly “officially” named in 1993 but was formed in 1987 or 1988\(^ {23}\)). The better view is that the cut-off date should be the date when Kony first formed his armed group, since a change of names is generally not decisive as to the identity of a party. At any rate, it is not without significance that many grievances in Acholiland, Lango and elsewhere relate to events that occurred earlier than that, in the direct aftermath of the NRA/M takeover in January 1986 (while many related or pseudo-related Southern grievances have even older roots).

Nevertheless, the second sentence provides that reconciliation (in distinction to accountability) may relate to events before the cut-off date. Of course, reconciliation is not a formal process but a result, which cannot be ordered (only “promoted”). Hence, it may be argued that for full reconciliation to be properly

\(^{19}\) Magistrates are also mandated to promote reconciliation and facilitate the settlement in an amicable way in case of offences of a personal nature not amounting to a felony. B.J. Odoki, “Reforming the Sentencing System in Uganda”, 1 The Uganda Living Law Journal 1, 10 (2003). This does not seem to apply to the cases at hand, though, since even to the extent that the crimes in question are of a personal nature, they certainly constitute felonies, and the criminal justice adjudication that is foreseen will be undertaken by the High Court.

\(^{20}\) The first years of the operation of the Community Service Act, Cap 115, are described in Ann Magezi, “Community Service in Uganda”, 1 The Uganda Living Law Journal 119 (2003). The main reasons for introducing the system seem to have been to save money and to decongest prisons, rather than because there is something inherently better about reconciliatory approaches, and in fact there are no provisions in the law that indicate that the service as such should contribute to a reconciliation. Cf Remarks by Deputy Chief Justice Of Uganda before National Community Service Committee, 6 November, 2001, available at http://www.restorativejustice.org/resources/docs/deputy/view, visited 20 March 2009.

\(^{21}\) Guideline 21 prudently suggests that the Prosecutorial strategy has to be “realistic about the scope of prosecutions”.

\(^{22}\) In South Africa, for instance, amnesty was only given with regard to particular acts, which meant that a perpetrator could still be prosecuted for an act which was not disclosed for the Truth and Reconciliation Commission. See Section 29, the South African Promotion of National Unity and Reconciliation Act, 1995. However, the Commission had no power to revoke an amnesty if it later turned out that full disclosure had not been given.

promoted, there is a need for accountability also for pre-1993/1988/1987 events, even if that is not provided for in the agreement. Existing Ugandan law would most likely enable such accountability, at least for the more serious crimes. Further, and perhaps more realistically, the historical analysis foreseen in Clause 2.3 could cover also the period before the conflict with the LRA (see below, section IV on reconciliation and truth-telling).

III. Accountability

A. Formal measures (courts)

Given the centrality of Joseph Kony’s concerns for the future of the criminal charges against him, and given the necessity for a complementarity challenge before the ICC in order to “lift” the arrest warrants, the formal measures have been at the forefront of the talks.

According to Clause 7 of the Annexure, a special division of the High Court of Uganda shall be established. Clause (9) (a) – (d) provide that legislation is needed on the constitution of the court, the substantive law, appeals and the rules of procedure. The accords clearly foresee a temporary special division with a mandate to try those responsible for serious crimes in the conflict involving the LRA, but there is nothing in the accords that prevents the Government of Uganda from making the division permanent and to give it wider jurisdiction. In fact, that seems to be the case, at least as far as the plans of the leadership of the High Court are concerned.

When it comes to the constitution of the court, one notes that the War Crimes Division (WCD) has already been established through an administrative decision by the Principal Judge. It is, however, evidently foreseen that a legislative intervention might be appropriate, and there have been suggestions to include the provisions on the Court in the pending ICC Bill. In this context, one further notes that Clause 8 stipulates that there should be a separate registry for the special division with special added tasks (protection of witnesses, victims, women and children). The special tasks will be further commented upon below, sections VI and IX.

The division is given the mandate in Clause 7 “to try individuals who are alleged to have committed serious crimes during the conflict.” This deceptively clear clause contains at least a couple of cans of worms, namely the jurisdiction rationae materiae (substantive jurisdiction) and the jurisdiction rationae personae (personal jurisdiction), and I will deal with them in that order, and also touch a bit upon the substantive law. In addition, a number of procedural issues, such as the position of victims, the right to counsel, etc, will have to be dealt with.

1. Substantive jurisdiction

As just mentioned, the Annex stipulates that the task of the special division shall be “to try individuals who are alleged to have committed serious crimes during the conflict.” In order to ascertain the substantive jurisdiction, it is necessary to go back

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24 Statutory limitations do not apply to felonies in Uganda.
25 During the Thirteenth Joint Government of Uganda/Development Partner JLOS Annual Review, 2 December, 2008, Justice Ogoola, the Principal Judge, announced that the High Court would like to construct a permanent building for the new War Crimes Division and the Anti-Corruption Division, and the thinking behind that proposal seems to be that the division should be permanent.
26 International Criminal Courts Bill, 2006. If so, the Bill might be renamed the International Crimes Bill.
27 It might be appropriate to mention in this context that there are plans to include two foreign judges on the bench. In fact, it appears that it was for that reason that only three judges have been nominated so far to what is planned to be a five-judge panel. The view that other African or East African judges should be appointed came out several times during the consultations. (See footnote 112.)
28 Clause 7 of the Annexure.
to the Agreement. Clause 4.1 provides that “formal criminal and civil justice measures” shall apply to “serious crimes or human rights violations”. This raises several questions.

The first one relates to the distinction between the serious crimes and human rights violations. Clause 6 on Formal Justice Processes, which further develops Clause 4, separates the treatment of “serious crimes” and “gross human rights violations”, respectively.28 “Serious crimes” seems to refer to individual acts, over which “[f]ormal courts provided for under the Constitution shall exercise jurisdiction” (Clause 6.1). Allegations of gross human rights violations, on the other hand, shall be “adjudicated” by “[f]ormal courts and tribunals established by law” (Clause 6.2). It is not immediately clear that there is a real difference between these two expressions. However, it must be presumed that it is not by chance that crimes and human rights violations have been dealt with in different provisions. This might mean that the jurisdiction of the WCD does not cover human rights violations as such.29 This is proper, since “violating human rights” is not an established crime under either Ugandan or international law; even though some acts that constitute “serious crimes” also constitute human rights violations, different subjects are responsible — the individual and the state respectively — and the legal requisites are different. Hence, human rights violations should most likely be adjudicated only as civil claims in one form or the other, which I will deal with further in section III.A.3.

The next question is what sort of “serious crimes” the WCD should have jurisdiction over. Clause 6.1 specifies that “[f]ormal courts provided for under the Constitution” shall deal with “the most serious crimes, especially crimes amounting to international crimes”. “International crimes” is now most often taken to mean genocide, crimes against humanity and war crimes.30 This term has clear connotations under international criminal law, since it suggests that all states — including the Government of Uganda — have a right and arguably also a duty to prosecute such crimes.31 However, according to Afako, the term is used only “by

28 This in fact answers a question concerning Clause 4.1, namely whether the qualifier “serious” applies to both “crimes” and “human rights violations”. The answer seems to be “yes”, since the qualifier “gross” in Clause 6 suggests that “serious” in 4.1 pertains to both types of abuses. I will revert in section VII to the question what should be done with violations that are not gross.

One could note in this context that the second preambular paragraph speaks of “serious crimes, human rights violations”, which is ambiguous, since at least one word seems to be missing — an “and”. At any rate, as a preambular paragraph without specific reference to the matters dealt with in Clauses 4 and 6, it has far less weight.

29 According to the traditional view, maintained by most governments, only states — i.e., the government and its agencies and associated bodies — can commit human rights violations. Therefore, the term “human rights abuses” is sometimes used to label atrocities committed by non-state actors.

In recent years, that distinction has been challenged. For example, it has been held that acts committed by rebels can also be called human rights violations, at least if such a group exercises de facto authority in some territory. Andrew Clapham, Human Rights Obligations of Non-State Actors, 271 et seq (2006). At least from a policy point of view, I agree with this opinion. In Sierra Leone, the mandate of the truth-commission included both “violations” and “abuses”. See Section 6 of the Truth and Reconciliation Commission Act 2000, cited from Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, Vol 1, p 24 (2004), http://www.resisieraleone.org/drwebsite/publish/index.shtml, visited on 27 February, 2009.

Regardless of which view is correct, the ambiguity seems to be of little importance for the purpose of criminal law, since the atrocities committed by the LRA will be covered by the word “crime” at any rate. However, it should be noted in this context that many human rights abuses are not sufficiently serious to prosecute, let alone to be put on the same level of gravity as mass killing, maiming and kidnapping. Hence, for purposes other than prosecutions, it might be relevant whether an act is covered by the term “human rights violation”. Cf also comments on Clause 5.5, section XI.

29 See preambular paragraph 6 of the Rome Statute of the International Criminal Court.

30 It is beyond doubt that there is universal jurisdiction for such crimes, i.e., that any state may prosecute them regardless of what is agreed between the parties. It is less clear whether, in addition to the right to prosecute, there might also be an obligation to do so. Such obligations are generally phrased as obligations to either prosecute or extradite to a country that is willing to prosecute. Obligations to prosecute most war crimes (“serious breaches”), if committed in international armed conflict, follow from the Geneva Conventions and their Additional Protocols while the 1948 Genocide Convention obliges states to prosecute genocide and 1984 Convention Against Torture has the same effect regarding torture. (Uganda is a party to all of these conventions. It should be noted that
analogy” and not as a binding description of the crimes, since these crimes are not mentioned in the criminal law of Uganda.32 Hence, under this view, the acts would not be prosecuted as international crimes but under domestic law rubrics.

a) The principle of complementarity

This brings me to another set of problems -- those relating to the ICC principle of complementarity, which will prompt us to discuss in detail whether international crimes can be used to prosecute for the acts committed during the conflict. The ICC aspect will be analysed more fully in section XI, but specific issues need to be covered here and in other sections prior to section XI.

In order to win a complementarity challenge before the ICC, Uganda would probably have to be able to prosecute for all or most of the ICC charges against the LRA leaders (for example, 33 counts against Kony).33 My analysis of the Ugandan Penal Code Act suggests that all of these acts are covered by current law, with the possible exception of inducing rape. Still, it seems unsatisfactory to prosecute under such mundane headings as “abduction” and “assault”. Those rubrics do not quite capture the aggravated nature of these atrocities, which – in distinction to most “ordinary” crimes – have been systematic in nature. The ICC might think the same way. Therefore, it is possible, though quite far from certain, that Uganda needs to prosecute under the same or similar rubrics as the ICC, i.e., “crimes against humanity” and “war crimes”, in order to reflect the gravity of the crimes in question.34 Another measure which has been suggested to go some way towards

duties concerning grave breaches and torture apply to all crimes world-wide, while the genocide convention only applies to crimes committed within the territory of the state in question. Regarding crimes against humanity and war crimes other than grave breaches, including war crimes in internal armed conflict, the situation is less clear, since there are no treaty provisions which explicitly provide for obligatory investigation, prosecution or extradition.

32 Afako 9.

In the Lubanga case, Pre-Trial Chamber I averred that “for a case … to be inadmissible, national proceedings must encompass both the person and the conduct which is the subject of the case before the Court.” Situation in the Democratic Republic of the Congo in the Case the Prosecutor v. Thomas Lubanga Dyilo, ICC, 10 February 2006, Warrant of arrest for Thomas Lubanga Dyilo, 01/04-01/06-B Corr, para 32, available at http://www.icc-cpi.int/reports/docs/doc/191959.PDF, visited on 20 March 2009. Lubanga was charged in the DRC with other crimes than those before the ICC, but crimes that were at least equally serious. This judgment is controversial, and it is not at all certain that Pre-Trial Chamber II – which has been entrusted with the LRA cases – will take an equally strict view. However, even if that Chamber would be satisfied with Uganda prosecuting other but equally serious crimes, it would most likely not accept that Uganda prosecutes the LRA leaders for considerably less serious offences. At any rate, given the uncertainties regarding the Court’s views in this early stage of its judicature, it would certainly be advisable for the Ugandan authorities to try to cover as much as possible of the catalogue of charges.

34 In the Bagaragaza case, the ICTR ruled that the case could not be transferred from the ICTR to Norway on the ground that under its Statute, the ICTR has jurisdiction to transfer indictees only to jurisdictions where they could be tried for serious violations of international criminal law. Since both parties and the Kingdom of Norway recognised that Bagaragaza could only be tried for ordinary crimes when transferred to Norway, and not for violations of international humanitarian law, the Appeals Chamber concluded that it could not sanction the proposed transfer. The Prosecutor v. Michel Bagaragaza, Case No. ICTR-05-86-AR11bis, http://69.94.11.53/default.htm, visited on 20 March 2009. The pertinent part deserves to be quoted:

“16. /--/--/ Norway’s jurisdiction over Mr. Bagaragaza’s crimes would be exercised pursuant to legislative provisions dealing with the prosecution of ordinary crimes. /--/--/ Article 8 [of the Statute] specifies that the Tribunal has concurrent jurisdiction with national authorities to prosecute ‘serious violations of international humanitarian law’. In other words, this provision delimits the Tribunal’s authority, allowing it only to refer cases where the state will charge and convict for those international crimes listed in its Statute.

17. /--/--/ The Appeals Chamber agrees with the Prosecution that the concept of a ‘case’ is broader than any given charge in an indictment and that the authorities in the referral State need not necessarily proceed under their laws against each act or crime mentioned in the Indictment in the same manner that the Prosecution would before this Tribunal. In addition, the Appeals Chamber appreciates fully that Norway’s proposed prosecution of Mr. Bagaragaza, even under the general provisions of its criminal code, intends to take due account of and treat with due gravity the alleged genocidal nature of the acts underlying his present indictment. However, in the end, any acquittal or conviction and sentence would still only reflect conduct legally characterized as the ‘ordinary crime’ of
demonstrating the gravity of those acts is to formulate the jurisdiction clause in terms of international crimes, and the designation “War Crimes Division” (WCD) certainly corresponds to that idea. However, that in itself would probably not satisfy all those who believe that the headings of the crimes should correspond to the rubrics used in international discourse.

What about the Geneva Conventions Act? Would it suffice? It criminalises many war crimes as grave breaches of the Geneva Conventions, including:

“wilful killing, torture or inhuman treatment, / ---/ wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, / ---/ taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

This would cover most or all of the counts against Kony. Hence, the Geneva Conventions Act would cover most if not all of the atrocities – if it applies.

However, the penal provisions of the Act are most likely not applicable to the conflict in northern Uganda, since the concept of grave breaches as set out in the 1949 Conventions only applies in international armed conflict. One could possibly argue that the LRA conflict was an international conflict, due to the assistance by the Government of Sudan to the LRA. However, at the time of the LRA crimes now charged before the ICC, the assistance from Khartoum was reduced compared to the 1990s, when the LRA had permanent and protected bases in Sudan and it is therefore not likely that a court would find that LRA acted under the control of Sudan. Hence, if the LRA conflict is an internal one, then the criminalisations in the Geneva Conventions Act do not apply.

One could further refer to common Article 3 in the Geneva Conventions, which supplies some minimal rules that apply also in internal conflict, and argue that...
they can form the basis of a crime. However, although it can now be safely said that serious violations of common Article 3 constitute war crimes under international customary law,\(^39\) the criminalisation has not been incorporated in Ugandan Law. Therefore, in the view of this author, the Act as such does not suffice as a criminal law basis for a prosecution. At any rate, the Geneva Conventions Act does not cover crimes against humanity.

So, it is uncertain whether the current Penal Code Act and the Geneva Conventions Act are sufficient to adequately prosecute the LRA leaders or others guilty of similar crimes. In order to remedy that potential problem, Uganda would have to introduce war crimes and crimes against humanity into its penal legislation, most conveniently by adopting the pending International Criminal Court Bill, 2006, which incorporates genocide, crimes against humanity and war crimes as set out in Articles 6-8 of the Rome Statute of the International Criminal Court.\(^40\)

**b) The Principle of legality**

However, if it is envisaged that the crimes in the ICC Bill will apply to acts committed prior the entry into force of the act, then the principle of legality, with its prohibition of retroactive criminalization, would come into play. The purpose of this principle is to ensure that an individual knows before he or she acts whether a certain act is penalised or not. International human rights law enshrines the principle of legality but makes an explicit exception in cases of international crimes. Article 15 of the UN International Covenant on Civil and Political Rights states:

>“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. /---/”

Hence, the principle of legality in international human rights law allows prosecutions for acts or omissions that were not criminalised under applicable domestic law, provided that the acts or omissions were criminal under international law.

Nevertheless, domestic law may have a stricter rendering of the principle of legality, if that would not contravene other international obligations. Different countries have taken different approaches regarding retroactivity. “Pseudoretroactive” (or rather retrospective) law has been allowed in, for instance, Germany, France, a number of Easter European States, Canada, Australia, New Zeeland, and Argentina. Although the practice has not been wholly consistent in some of these countries, they have all allowed prosecutions for crimes which were covered by international law at the time of commission but which were only later incorporated under domestic statutes.\(^41\) The war crimes trials after World War II often penalised behaviour that was not necessarily criminal at the time and place where the acts were committed.\(^42\) States have allowed their legislation, like Spain\(^43\) or the Canadian Crimes Against Humanity and War Crimes Act, 2000, to reach back in

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40 The Bill, which is presently pending in Parliament, would be known as the International Criminal Court Act 2006, but is virtually identical to the Bill that included the International Criminal Court, 2004. There are at present suggestions to amend its name to the International Crimes Bill, 2009, provided that it encompasses also provisions regarding the War Crimes Division of the High Court.


42 W. N. Ferdinandusse, ibid 228.

time. The same goes for Rwanda, which introduced its law on genocide in 1996, although it applies already from 1990. Senegal is also an interesting case. After a report by an AU commission of jurists regarding the Hissène Habré case, on February 12, 2007, President Wade signed into law amendments to Senegal’s penal code and code of criminal procedure. These amendments incorporated the crimes of genocide, crimes against humanity and war crimes and gave Senegalese courts competence over these crimes even when committed outside of Senegal by non-Senegalese. In April 2008, Senegal amended its constitution to make clear that its courts could prosecute genocide, crimes against humanity and war crimes committed in the past.

**c) Uganda’s position on legality**

What does Ugandan law say? Article 28(7) of the Ugandan Constitution provides:

“No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.” (Emphasis added.)

Some people would interpret this to mean that it would be impossible to prosecute and adudge under an ICC Act for deeds which were committed before the entry into force of that Act. Such a strict reading would not be mandated by international law. Still, as mentioned, a country may adopt a stricter standard, if that does not violate other obligations under international law.

This means that if Uganda is obliged to prosecute, then it cannot have a stricter interpretation of the principle of legality, if that stricter interpretation would be an obstacle to prosecutions. It is a moot point whether Uganda does have an obligation to prosecute for those crimes. There is a general duty to combat impunity, but probably no special obligations regarding crimes against humanity and war crimes in internal armed conflict (if the LRA conflict was internal at the time, which this author believes).

Be that as it may; even if there is no such strict obligation to prosecute these crimes, Uganda has an interest in doing so, in order to strengthen a complementarity challenge. Hence, the problem has to be faced.

There are two alternative ways to get around this, and both involve a close reading of Article 28 of the Constitution. It suffices that one of these two arguments be accepted, for Parliament to be able to make the ICC Bill applicable retrospectively:

1. The Constitution does not say “constitute a criminal offence under Ugandan law”, but leaves it open whether it is restricted to domestic legislation or not. These acts did constitute criminal offences under international law, which is a law binding also on Uganda. Hence, under this reading, there is no obstacle to introducing new legislation which criminalises acts under domestic law that have

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44 The Canadian Constitution provides that “[a]ny person charged with an offence has the right / ---/ (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations” (Section 11 of the Charter of Rights and Freedoms).


already been criminalised under international law. This argument, of course, entails that one determines when the various crimes were established under international law; in such an operation, the date of the Ugandan ratification of the Rome Statute is not relevant.49

2. One has to distinguish between the act and the crime. The act is what takes place “in real life”, whereas the “crime” is that name or rubric which the penal law gives to the act (“war crime”, “murder”, etc). Recall that the Constitution provides that “[n]o person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence” (emphasis added). Hence, it is not prohibited to introduce new crimes with retroactive application, as long as the acts or omissions in question were criminalised by some other provision at the time of commission. Otherwise the Constitution would have said “[n]o person shall be charged with or convicted of a criminal offence, which is founded on an act or omission that did not at the time it took place constitute that criminal offence.”

This view of the principle of legality was also the position taken by the Special Court for Sierra Leone in the Hinga Norman case50 as well as recently by a Norwegian Court.51 In fact, as already noted, all or almost all of the acts for which Joseph Kony is charged before the ICC are illegal under the Penal Code Act. To give them new and more adequate names or rubrics under the ICC Bill would thus not change anything as far as the principle of legality is concerned.52

I think that these two interpretations – which can actually be combined – provide better interpretations of the Constitution than the strictest one.53 These interpretations would also be perfectly in line with the purpose of the principle of legality, which is to protect individuals, by ensuring that each individual knows in advance what is legal and what is not. Joseph Kony and his comrades knew that it was illegal to attack an IDP camp and kill and maim 200 people, and to kidnap and sexually enslave girls.54 Those acts were illegal both under international law and under existing national law.

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48 This interpretation would thus allow the use of new criminal legislation for old acts, provided that this new legislation is covered by international criminal law. This interpretation would not, however, necessarily allow convictions for crimes which are not domesticated even at the time of the prosecution and the judgment, i.e., which are based only on international law. This aspect of the principle of legality is addressed in Article 28(12) of the Constitution.

49 The crimes involved have mixed legal backgrounds; some were established by treaties, some by customary law, and some crimes, first established under customary law, have later been codified in treaties. For all of the crimes in the Rome Statute, it can safely be said that they were established as crimes at the date of the adoption of the Rome Statute – 17 July, 1998 – since the Statute was drafted under the principle that no new crimes would be created. 1994 could also be a cut-off date; see footnote 59. Nevertheless, most of these crimes were formulated much earlier.


51 See http://www.alternet.org/thegreen/newsdesk/L1655667.htm, visited on 20 March 2009. This despite the fact that the Norwegian Constitution appears to be quite strict. Article 96: “No one may be convicted except according to law, or be punished except after a court judgment. /.../” Article 97: “No law must be given retroactive effect.”

52 This seems to contradict the earlier argument that there is a need to incorporate international crimes into Ugandan law. Two things need to be emphasised in this context. First, it is my view that although the new crimes would be more adequate both legally and politically, existing Ugandan law ought to satisfy the ICC’s requirements under the legal principle of complementarity. However, we cannot know that until the ICC has made such a determination. Second, as mentioned below (footnote 56), there are some acts which constitute international crimes that are not covered by Ugandan domestic law, in particular the mode of responsibility called command responsibility. For these acts, the issue of legality under the Ugandan Constitution would arise. They would not be problematic for the principle of legality under international law, however.

53 I must admit that I have not been able to consult the preparatory works of the Constitution for the intention of the drafters. In my view, it is the wording of a law – even if slightly ambiguous – that has priority, and not the preparatory works, but opinion is divided on that issue.

54 This might not be true for some other crimes criminalised by the ICC Bill, though, and I am here thinking in particular of crimes falling under command responsibility; see footnote 56. Therefore, if the Bill were to be given
At present, it appears that the international crimes in the ICC Bill are not intended to have retrospective effect. 55 In order to create such an effect, the bill might have to be amended by introducing, in part I, a provision which brings Articles 7-9 and 17-19 to apply also to acts which have been committed before the coming into force of the Act.

Two caveats must be introduced, however. Firstly, if Parliament would accept the second argument but not the first one, then the future ICC Act can be given retrospective effect only with regard to those acts which were already covered by some other Ugandan criminal law. Whereas the charges against Kony et al are covered by and large by the Penal Code Act, that is not necessarily the case for all war crimes and crimes against humanity, or for all forms of involvement in the acts. In particular, it is open to doubt whether the principle of command responsibility is covered. 56 Parliament could provide for that differentiating effect by inserting in the new clause the words, “insofar as those acts or omissions where criminal under Ugandan law at the time”, or something similar.

Secondly, a “retrospective” law could be challenged before the Constitutional Court. It is of course possible – and in my view that would be the best outcome – that the Constitutional Court and/or the Supreme Court accept the interpretation of the Constitution that I have offered. However, such a challenge would nevertheless entail a stay and delay in the proceedings; the length of that stay would be determined inter alia by how much priority the Court would attach to the case. 57 In order to safeguard his/her prosecutions, the prosecutor could therefore make alternative charges or charges under multiple heads (for instance “crimes against humanity” and “murder”). That would give room for manoeuvre if a constitutional challenge were to be made. 58

Hence, if Parliament wants to be sure that the acts charged in the ICC can be prosecuted fully in Uganda, then it should adopt the ICC Bill with retrospective effect, reaching back at least until 1998, when the Rome Statute was adopted, or perhaps 1 January, 1994, from which the jurisdiction of the International Criminal Tribunal for Rwanda (ICTR) begins. 59 If Parliament were to accept argument 1, it would be appropriate to clarify in some way that the criminalisation stretches back only as far as they are covered by international law. 60 If Parliament were to reject retrospective application, one might want to provide that this shall apply only to those crimes which were covered by existing criminal law at the time of commission.

55 There is no provision indicating that they would have effect as to crimes that have taken place before the entry into force.

56 Article 28 of the Rome Statute provides that a military commander who fails to “exercise control properly” over his or her forces is responsible for crimes committed by such forces if that person “either knew or … should have known that the forces were committing or about to commit such crimes” and failed to prevent or repress those acts. The only provision in Ugandan law which, to my knowledge, comes close to being relevant in such circumstances is Section 114 in the Penal Code Act, Cap 120, on neglect of duties.

57 I have been told by an expert that in a high-profile case like a prosecution of an LRA commander, the Constitutional Court would handle the matter with priority, and might be able to deliver a ruling within a couple of months or less.

58 Alternatively, in order to safeguard against constitutional challenges, Parliament could amend Article 28 of the constitution, for instance by inserting the words “under Ugandan law or international law” at the end of paragraph 7. A creative lawyer could, however, still argue that such a change would in itself be retroactive and thus contradict natural justice. In my view, any such challenge ought not to be successful, but that is ultimately for the Supreme Court to decide.

59 Cf footnote 48. The Statute of the ICTR was the first generally accepted document that clearly criminalised war crimes in internal armed conflicts and crimes against humanity without a nexus to an armed conflict.

60 Here are two ways of doing it:

(1) “Clauses 7-9 shall apply also to acts and omissions that take place before the entry into force of this Act, provided that these acts were criminalised under international law at that time.” This leaves it to the relevant court to determine when international law criminalised the act in question. Since it is foreseen that these crimes will be adjudicated by the WCD, which will have special expertise and training, that is clearly a feasible road. However, it could also be possible for the legislature to provide some guidance, for instance during the deliberations in parliament or through an opinion by the Attorney General, etc.
argument 1 but accept argument 2, it would need to provide for retrospective effect only as far as the ICC crimes are covered by current Ugandan penal law.\textsuperscript{61}

2. **Personal jurisdiction**

Another very important issue is whether the War Crimes Division should have jurisdiction over both state and non-state actors. The most common view seems to be that the special war crimes division is intended to be open only to non-state actors,\textsuperscript{62} but this view can be challenged, firstly by reference to international law and secondly, and perhaps more convincingly, by reference to the agreements themselves.

Firstly, international humanitarian law, in as much as it applies in international conflicts, provides that combatants from the enemy side should be prosecuted in the same courts as own combatants.\textsuperscript{63} While this rule is not directly applicable in the non-international conflict between the Government of Uganda and the LRA, it is still good legal policy to hold both sides accountable before the same court, and as a minimum, any special court should not treat the non-state side more adversely, in comparison with cases against government agents.

Secondly, although the accords are by no means clear, they do provide ample room for the interpretation that both state and non-state actors should be judged by the War Crimes Division. For sure, statements from some of the negotiators and others involved clearly suggest the intention to have separate systems for LRA and government actors, and if the parties agree to that interpretation, the wording certainly leaves that option very open.\textsuperscript{64} But one could well envisage that the parties disagree on the interpretation of the agreement in this respect, since it is almost a standard grievance from northern Uganda that those most responsible for crimes on the UPDF side have not been prosecuted. And if there is no agreement between the parties, then one has to revert to the text, which is far from unambiguous. Furthermore, it could be argued that what the parties sought to accomplish was primarily to ensure that LRA would not be subject to court martial and would meet less severe sentences than currently provided for, rather than to keep up the distinction as a goal in itself. As we will see, this intention does not contradict the idea of a unified forum.

Let us now see what is stipulated by the accords. Clause 7 of the Annexure seems to be the logical starting-point, since it provides the jurisdiction of the WCD. As has already been cited, this clause states that a new special division of the High Court shall try serious crimes, and makes no reference to any particular kind of actor. Hence, that clause in itself gives ground for no other conclusion than a comprehensive personal jurisdiction. However, a bifurcation between state and non-state actors may be produced by other provisions. Clause 23 of the Annexure is crucial and more ambiguous. It deserves to be quoted in full:

"Subject to Clause 4.1 of the principal agreement, the Government shall ensure that serious crimes committed during the conflict are addressed by the special Division (sic!) of the High Court; traditional justice mechanisms; and

\begin{footnote}{2} "Clauses 7-9 shall apply also to acts and omissions that take place before the entry into force of this act, but on or after [1 January, 1994] [17 July, 1998]." This would make the job of the WCD simpler. On the negative side, it would preclude the application of the substantive provisions concerning some crimes before 1994/1998, but on the other hand, most of the relevant acts were illegal anyway under the Penal Code Act or the Geneva Conventions Act, which penalises most grave breaches in international armed conflict.\end{footnote}

\begin{footnote}{61} See footnote 54.\end{footnote}

\begin{footnote}{62} Before the negotiation of the Annexure, the Government of Uganda suggested that prosecutions of LRA members would take place in a special tribunal, while the LRA/M rejected this suggestion.\end{footnote}

\begin{footnote}{63} Article 102, Geneva Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.\end{footnote}

\begin{footnote}{64} It depends to a large extent on how one interprets the words "existing justice process", as we will see soon.\end{footnote}
any other alternative justice mechanism established under the principal agreement, but not the military courts.”

First of all, we note that the rule provided here is that serious crimes shall be addressed by the WCD or any other alternative justice mechanism, but not the military courts. This means that jurisdiction over these crimes is withdrawn from the courts-martial, even for state-actors, as shown in more detail below.

What does Clause 23 say about the personal jurisdiction of the WCD? It confirms the more precise rule in Clause 7, which gives jurisdiction to the WCD, and like Clause 7, Clause 23 applies *prima facie* to all perpetrators. However, that presumption can be rebutted if there is an exception in the agreements. Through the words “subject to Clause 4.1 of the principal agreement”, Clause 23 makes it clear that Clause 4.1 applies also to the jurisdiction of the WCD, and that it may thus modify the provision in Clause 23.\(^{65}\) Clause 4.1 determines that state actors shall be subjected only to “existing criminal justice processes and not to special justice processes under this Agreement”. Hence, there is a distinction between “existing justice processes” and “special justice processes”. The latter term is not defined, and it does not appear in any other place in the agreement.\(^{66}\) The decisive issue here is therefore whether a procedure before a War Crimes Division of the High Court could be covered by any of these two terms – or perhaps by both.

In order to determine what is an “existing” or a “special” justice process, we have to know what a criminal justice process is. It is usually conceived of as a sequence of events, namely the whole process from investigation to appeal, as provided in relevant rules.\(^{67}\) The term does not, however, seem to cover the actual serving of the sentence. Neither does it cover the substantive rules. Hence, the rules invoked by the term are the procedural rules and, possibly but not certainly, at least some of the rules creating the institutions concerned.

What, then, does the reference to “existing justice processes” mean? Does it mean that no changes at all can be made to the procedure for state actors? That seems unreasonable; after all, states often make revisions of their criminal procedures. On the other hand, the creation of a completely new court with completely new rules of procedure would probably not fall under the category of “existing justice processes”, but would be a “special justice process”. So, the answer must be that certain changes – or a certain amount of changes – in relation to the status quo would mean that the “existing justice process” would no longer be the “existing” one but a new one. Where on this trajectory should one draw the boundary between “the existing” and “the special”?

I believe that the best interpretation is the following one, which both is perfectly compatible with the wording of the accords, and is merited by a teleological interpretation (an interpretation from the purpose of the text). I will start with the lexical analysis, which builds on the following two facts: Clause 23 of the Annexure provides that all perpetrators should be subjected to the WCD or other alternative justice mechanisms, but does not make any distinction between the categories of personnel except for a caveat in respect of Clause 4.1 of the Agreement. That clause provides that the state actors shall be subjected to existing justice processes. The High Court is clearly a court established by the Constitution, and the War Crimes Division

\(^{65}\) Given the fact that the Agreement takes precedence over the Annexure, that exception would have applied, anyway, but Clause 23 makes that clearer.

\(^{66}\) It seems that it does not include traditional mechanisms, because otherwise the defined term “alternative justice mechanisms” would have been used. That term covers not only traditional mechanisms but also formal processes “not currently administered in the formal courts established under the Constitution”.

is just another division of that court.\textsuperscript{68} The WCD may thus be an \textit{alternative justice mechanism} as declared in Clause 23, but whether the \textit{process} pursued in that division is “existing” or not depends on the content of the procedural rules. If the WCD more or less pursues the usual procedural rules, then the process before the WCD falls under the words “existing justice process”. However, if the rules are different, then the total sum of novelties could merit the term “an alternative justice mechanism”. Hence, WCD is part of an existing court, and it will judge state actors under “existing” rules (by and large) and non-state actors under partly new, “special” rules (the special rules are detailed in section III.A.3; see also next paragraph). So, the wording allows for the state and the non-state actors to be tried by the same division, although under partly different rules.

This interpretation is plausible though not the only plausible one.\textsuperscript{69} However, it is reinforced by a teleological reading. Such a reading suggests that the intention was to provide some special features which would facilitate reconciliation between the perpetrators on the LRA side and their victims. As a consequence of this purpose, and as a political compromise to entice the LRA leadership to sign and implement, the non-state actors were to be subjected to more lenient (perhaps reconciliatory) sanctions. Hence, there have to be special substantive rules applicable to the LRA, and most likely also special procedural rules, for instance to enable the Court to acknowledge the effects of traditional justice processes or to give the victims a role in decisions on sentencing (see further section III.A.3 nedan). It could not, however, possibly have been the object of these provisions to make it more difficult to prosecute those responsible on the government side than those on the LRA side; in fact, the Preamble declares that the parties are “committed to preventing impunity”.

This is not the place to evaluate the Government’s efforts of prosecuting individuals on the state side, but some commentators fear that impunity might be the consequence if UPDF violations continue to be dealt with exclusively by courts martial, as hitherto appears to have been the case;\textsuperscript{70} it is alleged that in these courts mainly or only low level perpetrators and not their responsible superiors have been charged.\textsuperscript{71} Such a consequence would clearly be an object both illegitimate and illegal, under Ugandan as well as international law.\textsuperscript{72} Therefore, if it is true that the alleged current practice with scattered prosecutions of low-level personnel in courts-martial is unsatisfactory, then at least some of the features of the accords that promote accountability should apply to both sides. As I will show in the next section, that applies to the special unit under the Director of Public Prosecutions (DPP), but it should also apply to the special War Crimes Division of the High Court. While it may be useful to have some special procedural rules apply only to the non-state actors,\textsuperscript{73} there is no reason to limit the jurisdiction of the WCD to non-state actors. The purpose of the creation of this division was to enable judges with special

\textsuperscript{68} That is in conformity with Clause 6.1 of the Agreement, which refers to “[f/oral courts provided for under the Constitution”.
\textsuperscript{69} One could also aver that “Alternative justice mechanisms” covers all “special justice processes” and no “existing justice processes”.\textsuperscript{70} Though not de jure since the DPP may prosecute military personnel in the regular courts. The DPP may prosecute “any person” according to Article 120(3)(b) of the Constitution, Article 139(1) of the Constitution provides that the High Court “have unlimited original jurisdiction in all matters” and Section 91 of the Uganda Peoples’ Defence Forces Act, Cap 307, makes it explicit that that act shall not “affect the jurisdiction of any civil court”.\textsuperscript{71} “Uprooted and Forgotten: Impunity and Human Rights Abuses in northern Uganda”, 17(12) Human Rights Watch, 41 et seq (September 2005, Vol. 17) although that report does not focus on the responsibility of commanders.\textsuperscript{72} While there is probably no hard duty to prosecute (or extradite for) all international crimes, it is clearly illegal for a state to condone impunity; that would not be to promote and respect human rights. See supra, footnote 31.\textsuperscript{73} In my own view, the special procedures might very well be useful also for many state actors; many soldiers of the UPDF deployed in northern Uganda are from that part of the country and many of them are former LRA soldiers.
experience and training to deal with these quite complex crimes, and there is no valid reason why that should apply to just one side.

Lastly, it is time to return to my contention that the accords stipulate that the courts-martial shall have no jurisdiction over the serious crimes, not even over UPDF personnel. This follows, perhaps surprisingly, from both a lexical/syntactic and a teleological (purpose-oriented) interpretation of Clause 23. The provision says the following, in short: (1) Serious crimes shall be addressed by “alternative justice mechanisms” but not by courts martial. This entails in short that all crimes shall be dealt with under the alternative justice mechanisms. (2) As mentioned, this provision has an important caveat – “subject to” – namely that “state actors shall be subjected to existing criminal justice processes” (the reference to Clause 4.1 of the Agreement). A “subject to” caveat does not invalidate the whole provision in which it is contained, but makes an exception, and that exception can only amount to what is excepted, namely what follows from the provision in Clause 4.1. Clause 4.1 does not provide that state actors shall be prosecuted before “courts martial”. It only provides that they shall be subject to “existing criminal justice processes” and not to “special justice processes”. There is already another existing criminal justice process available for UPDF soldiers besides the court martial, namely the regular criminal court system (the High Court). Consequently, it follows logically that for state actors, Clause 4.1 may change the effect of the first part of Clause 23,74 but not the exclusion of courts martial in the second part. This is further reinforced by Clause 6.1 of the Agreement, which stipulates that “[f]ormal courts provided for under the Constitution shall exercise jurisdiction over” the relevant crimes; the High Court is created by the Constitution, whereas court-martials are mentioned neither in Chapter Eight on the Judiciary (save for a reference in passing), nor in the sub-Chapter on the UPDF.75 Hence, it would be for the High Court to adjudicate such cases, and arguably – as stated above – that includes the WCD.

My guess is that this provision – which entered the draft at a quite late stage – was included to alleviate LRA/M fears that the LRA leaders would be court marshalled.76 Therefore, the conclusion above might appear surprising. However, besides the logical interpretation of the text – which usually has primacy under international law77 -- there are a number of very good legal policy reasons for such a conclusion:

- As mentioned, it has been alleged that many perpetrators on the state side – in particular high level ones – have not been prosecuted, while punishment of privates has been harsh.78 Therefore, to submit all cases to a division of the High Court rather than courts-martial for state-actors is a good step, and in conformity with international law.79

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74 As stated above, the effect of this clause is that state-actors will be treated under existing procedures.
75 Such tribunals are mentioned in the constitution (see Section 137), but the constitution does not provide for their creation or jurisdiction. The issue came up in Constitutional Petition no. 18 of 2005 between the Uganda Law Society (Petitioner) and the Attorney General (Respondent). http://www.saflii.org/ug/cases/UGCC/2006/10.html, visited on 20 March 2009. By three to two, the Supreme Court found that the General Court Martial was not subordinate to the High Court.
76 The UPDF Act would allow that, even though the LRA combatants of course are not members of the UPDF (even though some former LRA soldiers are). See Section 15, Uganda Peoples’ Defence Forces Act, Cap 307, which includes under the military court system “every person found in unlawful possession of arms, ammunition, equipment and other prescribed classified stores ordinarily being the monopoly of the army.”
77 See Article 31, the Vienna Convention of the Law of Treaties.
79 As explained in footnote 31, the government has a duty to prosecute at least some international crimes.
• The fair trial guarantees provided in the Agreement as well as in the Constitution and international conventions to which Uganda is a party can be more easily upheld in regular courts than in a courts-martial.\textsuperscript{80}

• The jurisdiction of the Special Unit of the DPP is clearly and intentionally not restricted to the non-state actors,\textsuperscript{81} which means that it was the intention that the special unit would investigate and prosecute both sides. The DPP does not have authority to prosecute before courts martial.\textsuperscript{82}

• The two sides should as a general rule be treated even-handedly, and that can more easily be secured if their cases are being tried before the same court and – most preferably – before the same bench (the WCD).

• While there is clearly a legitimate (though not necessarily overriding) interest of the UPDF to retain court martial jurisdiction in order to uphold discipline in the army, when it comes to serious crimes -- and in particular crimes involving human rights -- the public interest might arguably weigh more heavily in favour of the regular courts, which are mandated and trained in upholding the legal system in total.

• It is foreseen that the judges in the Special Division, who have been handpicked for their prior relevant experience, will receive training in judging war crimes and other such crimes, which are often different in nature from “ordinary” crimes; they involve a chain of command, they are often systematic in nature, and they are based on international legal sources.\textsuperscript{83}

Having said all of that, the syntactic and logical interpretation, as well as the arguments relating to the purpose, will all be overturned if it can be established that the parties – both of them – intended to give a particular meaning to the terms (“special justice process”, etc).\textsuperscript{84} Be that as it may, nothing prevents the Government of Uganda from deciding to exclude the jurisdiction of courts martial in these cases, if it so decides in accordance with relevant provisions of the Constitution. All the legal policy related arguments above point in that direction.

It remains to say a few words about the process for civil claims. The Agreement does not prevent state actors from being subjected to “special civil accountability processes or to participating in processes of reconciliation”,\textsuperscript{85} even

\textsuperscript{80} It is not submitted that the trials in courts martial never live up to standards of fair trial; while the field courts martial have much to prove in terms of fair trial standards, the record of the Court-Martial Appeal Court is considerable better. However, there are certain factors that might be detrimental even in that court, such as the composition of the court and the sometimes insufficient qualifications of the defence council. The court-martial system is regulated in Uganda Peoples’ Defence Forces Act, 1992, which relies on regulations for some of the details, such as the composition of the appeals court (see Section 84). The court-martial system has been criticized by the US State Department, which wrote in 2003 that “[t]he military court system often did not assu...military court system was also at the heart of...the military court system often did not assure the right to a fair trial.” Country Reports on Human Rights Practices, Uganda, 2003, at http://www.state.gov/g/drl/rls/hrrpt/2003/27758.htm. For criticism concerning the admission of confessions obtained through torture, see Human Rights Watch, State of Pain, March 28, 2004, http://www.hrw.org/en/node/12150/section/9. The military court system has further been criticised by respectable Ugandan human rights NGOs; see Foundation for Human Rights Initiative, “The Human Rights Status Report pp. 28-29 (2007) http://www.fhri.or.ug/index.php?option=com_content&task=view&id=50&Itemid=1. See also for a number of problems, Foundation for Human Rights Initiative, “Deprivation of the Right to Life, Liberty and Security of Person in Uganda, Report for the Period January to June 2006”, 42, 45 and 57 et seq, available at http://www.fhri.or.ug/, visited on 20 March 2009. The military court system was also at the heart of Constitutional Petition No. 18 of 2005, between the Uganda Law Society (petitioner) and the Attorney General (respondent), as well as Constitutional Appeal No. 3 of 2005 between Attorney General (Appellant) and Joseph Tumushabe (respondent).

\textsuperscript{81} Cf Fairway, supra note 10, 17.

\textsuperscript{82} Section 120(3)(a), the Constitution of the Republic of Uganda.

\textsuperscript{83} Justice Ibanda Nahamya has experience from the International Tribunal for Rwanda as well as from the Special Court for Sierra Leone, while the other two judges have expertise and experience that is useful for trials of this nature, but which does not cover all aspects thereof.

\textsuperscript{84} Article 31(4), the Vienna Convention on the Law of Treaties.

\textsuperscript{85} Afako 7.
though such processes are not regulated in any detail in the accords. Civil accountability processes might deal with individual or state liability. Civil liability for individuals – such as claims for compensation from UPDF commanders or LRA rebels -- can presumable be claimed under the established Ugandan civil procedures. The procedures relating to state liability, on the other hand, might look different. In either case, the costs involved in civil claims will often be prohibitive. Clause 9 on reparation therefore sets out that “mechanisms” shall be adopted for individual as well as collective reparations; the Ugandan Human Rights Commission is also an available forum. See further infra, section VII.

3. **Sentencing**

Having now dealt with the substantive and the personal jurisdiction, we come to another crucial feature, namely sentencing. The whole purpose of the Juba exercise was to “lure” Joseph Kony and his rebels out of the bush, and the negotiators therefore agreed that the available sentences should not be too harsh. Sentences for the acts concerned here are quite severe in existing Ugandan penal law, and include the death penalty. Clauses 6.3-4 of the Agreement, however, privilege the LRA by prescribing “a regime of alternative penalties and sanctions” for the non-state actors. These penalties and sanctions shall reflect various factors. One of them is “the gravity of the crime”, but that is to be weighed against the other considerations, namely to “promote reconciliation between individuals and within communities; promote the rehabilitation of offenders; take into account an individual’s admissions or other cooperation with proceedings; and, require perpetrators to make reparations to victims.”

Unfortunately, this difficult issue of sentencing is not regulated further in the annexure, but is left to the legislators. They have a balancing act to look forward to, because it is not likely that the ICC will accept a proceeding that ends up in a symbolic penalty, since that would be thought of as a measure to “shield” the perpetrators or as being “inconsistent with an intent to bring the person concerned to justice”. On the same note, and with the same purpose to allow milder sentences for the LRA indictees, the accords contain provisions regarding the cooperation of individuals with the formal criminal and civil proceedings. Clause 3.6 indicates that cooperation could be rewarded with a mitigated sentence, while the preceding Clause 3.5 explains that cooperation may consist of “the making of confessions, disclosures and provision of information on relevant matters.” Clause 15 in the Annexure elaborates this, by specifying that the information may relate to “(a) His or her own conduct during the conflict; (b) Details which may assist in establishing the fate of persons missing during the conflict; (c) The location of land mines or unexploded ordnances or other munitions; and, (d) Any other relevant information.” One could certainly envisage that such cooperation might result in the mitigation of sentences, and from the presentation at the Fairway workshop, that seems to have been the purpose. Perhaps this should also be seen in the light of the possible links between the formal accountability procedures and non-judicial procedures, such as truth- and reconciliation procedures or traditional mechanisms, in which confessions and disclosures can be made.

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86 Ugandan law does provides for liability for the Government. This follows from common law and, as far as human rights violations are concerned, from Article 50 of the Constitution.
87 Clause 6.4 of the Agreement. See further Guideline 26. As noted regarding Clause 9.3, infra section VII, reparations from perpetrators may constitute a sanction.
88 See Article 17 of the Rome Statute of the International Criminal Court, cited in section X. This provision does not have any language that specifically addresses very light sentences, but it is submitted that the Court will not accept a symbolic penalty, and might take that to be an act of shielding the defendant or to be “inconsistent with an intent to bring the person concerned to justice”. I will return to this issue also in section X.
89 Fairway, infra note 10, 17 & 22.
In the same spirit, Clause 3.2 states that “accountability proceedings should … promote reconciliation and encourage individuals to take personal responsibility for their conduct”. Personal responsibility can be taken by providing information as above but arguably also through alternative mechanisms, and such mechanisms can also contribute to reconciliation. There has further been discussion of including assessors – including from the affected communities – in the courts, which might allow these communities to weigh in accountability and reconciliation efforts that the suspect has gone through. Another option might be to allow representatives of affected communities to make presentations before the court. Lastly, Clause 3.6 seems to enable plea bargain, which as such is not a part of the current Ugandan legal system.90

4. Relation to other procedures

All of these provisions open the door for a potential interaction between formal criminal justice and traditional and other communal justice mechanisms. Such mechanisms can come in at any stage of the criminal justice process: pre-investigations, formal investigations, prosecutions, determination of guilt, determination of sentencing, serving of sentence and after finished sentence. If they come in early during the process, they will wholly or partially substitute for formal criminal justice – which is not envisaged for the most serious crimes – and if they come in late, during the sentencing stage, they will complement. It is beyond the scope of this article to explore this, however.91

Another important issue is “ne bis in idem”, or double jeopardy, which means that one should not be tried for the same crime twice. That provision is often conditional. In Swedish law, for instance, it is possible to reopen a case for a new trial if new evidence surfaces, even if the accused has already been acquitted. Under the Constitution of Uganda, “[a] person who shows that he or she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence shall not again be tried for the offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence,” with the exception of appeal or review proceedings.92 In the Rome Statute, the “ne bis in idem” provision is conditioned on the earlier proceeding being genuine.93 This is dealt with in the potentially quite problematic Clause 3.10 of the Agreement, which will be analysed more fully in section VIII.

5. Fair trial and some other procedural issues

Turning now to the provisions on procedure, Clause 3.3 of the Agreement encapsulates briefly the core fair trial protections, as set out in, i.a., Article 14 of the

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90 See Ayebare Tumwebaze, Criminal Proceedings: Criminal Law, Evidence & Procedure, 135 (2007), citing English practice. Afako further avers that the current criminal justice systems allow sentencers to take guilty pleas into account. Afako notes that in order to secure the rights of the accused/suspect, special rules might be needed to safeguard for false admissions. See Afako 5. Note also in this context that Clause 15 of the Annexure stipulates that “a person shall not be compelled to disclose any matter which might incriminate him or her.”


92 Article 28.9.

93 Article 20.3 of the Rome Statute provides: No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.
International Covenant on Civil and Political Rights and in Article 28(3) of the Ugandan Constitution. Interestingly, and wisely, the right to a fair hearing and due process apply not only to judicial proceedings, but also to other proceedings.94

The right for defendants and victims to legal representation is elaborated in Clauses 3.7 or 3.8. These are essential fair trial provisions, which cover also victims. However, the right to have legal representation at the expense of the State (legal aid) applies only in cases of serious criminal charges, though it still goes further then current Ugandan law, which only provides for a public defender for capital crimes. As regards victims, the right is granted to those who participate in proceedings with the same limitation that it relates to “serious human rights violations”. It is unclear how that affects the possibilities of victims to claim damages in civil proceedings95 or to otherwise participate in proceedings which do not relate to such violations, but one would imagine that legal representation in many cases is a practical precondition for participation. In addition, please recall here that the term “human rights violations” may not cover crimes by the LRA (see above, section III.A.1).

Concerning victims, it is useful here to remind of the ambitious but quite vague provisions on the position of victims, which will be referenced below (see section VI). The implementation of these provisions will most likely require a number of procedural provisions, including the right to make claims and the right to be present and to be represented, which both are secured in the Rome Statute.96

Clause 3.4 of the Agreement on the protection of witnesses is crucial.97 A body of experience and knowledge of such issues has been digested by the ad hoc tribunals, and developed with regard to the ICC.98 The protection of witnesses (as well as non-witness victims that take part in the proceedings) might necessitate not only concrete protective measures but also that the identity of a witness not be revealed to the accused, which calls for a careful balancing vis-à-vis the rights of the accused (see also Part 8.2).99 As far as can be ascertained, Uganda has no witness protection programme at present, but a bill on the protection of victims and witnesses will be drafted during 2009.100

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94 It is unclear how they will be implemented in the other procedures.
95 Afako notes the special problems with the representation of victims, who might be numerous and have conflicting interests (Afako 5).

In countries where contingency fees (conditional fee, “no win, no fee”) are accepted and common, victims might be able to access representation even without government support.
96 Cf Articles 15(3), 19(3), 68(3) and 75(3) of the Rome Statute of the International Criminal Court.
97 “In the conduct of accountability and reconciliation processes, measures shall be taken to ensure the safety and privacy of witnesses. Witnesses shall be protected from intimidation or persecution on account of their testimony. Child witnesses and victims of sexual crimes shall be given particular protection during proceedings.”
98 A number of provisions in the Rome Statute deal with the safety and protection of witnesses. See, i.a. Article 43(6) on the duties of the Victims and Witnesses Unit; Article 68(4), which provides that the Victims and Witnesses Unit shall advise the Prosecutor and the Court; Article 57(c) on the Pre-Trial Chamber’s duty to provide for the “protection and privacy of victims and witnesses;” Article 68 on the protection of witnesses and victims in the proceedings.
99 Cf, i.a., Article 68 (5) of the Rome Statute of the International Criminal Court, which states:

“Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

Cf also Article 81(3)-(5). These issues were discussed recently, i.a., In report by the International Bar Association, “Balancing Rights: The ICC at a Procedural Crossroads”, http://www.ibanet.org/Article/Detail.aspx?ArticleUid=152711BA-7FE9-4861-9996-8C43E8CFE420, visited on 19 March 2009.
B. Prosecutions and investigations

Perhaps even more important than the adjudication phase is that of investigations and prosecutions. It is imperative that the mandate of the prosecuting body is adequate and that it be given sufficient resources to carry out investigations and prosecutions. The Annexure, Clause 10, provides that “[t]he government shall establish a unit for carrying out investigations and prosecutions in support of trials and other formal proceedings as envisaged by the principal agreement.” The formulation is a bit strange, since investigations and prosecutions are not carried out “in support of trials”, but are, in fact, the very precondition for criminal trials. Nevertheless, it might be envisaged that the unit will serve also other proceedings than criminal trials, for instance civil proceedings or truth proceedings, although that has not been specified.101

1. Substantive jurisdiction

What is the substantive jurisdiction of this unit? When it comes to criminal justice proceedings, jurisdiction is determined by a number of provisions. First of all, since the objective of the unit is to “support” criminal justice proceedings, the jurisdiction of the unit would seem to be limited by the jurisdiction of the relevant courts, and, as ascertained above, WCD will have jurisdiction over “serious crimes [committed] during the conflict”, “especially crimes amounting to international crimes”.

This jurisdiction is further circumscribed by Clause 14 of the Annexure, which says that prosecutions should “focus on” those who have perpetrated “widespread, systematic or serious” attacks on civilians and on those who have committed “grave breaches of the Geneva Conventions”. This formula covers crimes against humanity (which per definition consist of widespread or systematic attacks against civilians102), and it also covers many war crimes, which may not necessarily be widespread or systematic but are still serious.103 Furthermore, the addition of “grave breaches” opens up the possibility of prosecuting also for unlawful acts against combatants (for example “take no prisoners”). However, as mentioned, the term “grave breaches” – which is a defined legal term -- is problematic, since it normally applies only in international armed conflict, and it is highly questionable whether the conflict in northern Uganda was such a conflict.104 Hence, this usage opens up for legal challenges if it is adopted in Ugandan law. The better term would have been “serious violations of international humanitarian law”105 or “war crimes”. Further, Clause 13 (a) of the Annexure provides that the unit shall identify individuals who have carried out “widespread, systematic or serious attacks directed against civilians”; one wonders here why those who have carried out grave breaches should not be identified, in spite of such crimes being “in focus”. This anomaly notwithstanding, it is submitted that it is likely that the prosecutions will be concentrated on those who have carried out attacks against civilians, since this has been the most conspicuous aspect of the conflict. Consequently, the mismatch between Clauses 13 and 14, as well as the questionable use of the concept of grave breaches, will probably not present any practical difficulties to the prosecution, if it focuses on widespread and systematic attacks against civilians.

101 If the Government of Uganda would want to prosecute in courts martial for international crimes, the unit would have a useful role, but, as implied, that would require an amendment to present law. See footnote 82.
102 See Article 7 of the Rome Statute of the International Criminal Court.
103 See Article 8 of the Rome Statute of the International Criminal Court. Please note the words “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes” (Article 8(1)). They indicate that even though the Court shall focus on planned or large-scale crimes, those requisites are not part of the definition of war crime.
104 See footnote 37.
105 “Serious violation” is the term used in Article 8(2)(b) of the Rome Statute to cover those war crimes which do not constitute grave breaches.
Lastly, we note in this context that there is no limitation in this clause to those who bear the greatest responsibility. It was, however, surely not the intention to go beyond the group of most responsible, i.e., the most senior commanders in the case of the LRA. Furthermore, such a limitation can be read into Clause 6.1, which gives jurisdiction to formal courts for “individuals who are alleged to bear particular responsibility.” Regardless of how this will be phrased in the implementing provisions, it is to be expected that the prosecutor will exercise her or his prosecutorial discretion so as to only prosecute the most responsible suspects. At any rate, the possibilities of prosecuting will, as far as the LRA side is concerned, be determined by how any future exceptions to the application of the Amnesty Act will be phrased.106

2. Personal jurisdiction

What about the personal jurisdiction? This clause makes no distinction between state and non-state actors; Clause 10 of the Annexure speaks of a “single unit”. That seems to be no coincidence.107 This is welcome, since, as mentioned above, there are many reasons that speak in favour of integration of all accountability proceedings, in particular at the stage of prosecutions and investigations.

How should the investigations be conducted? According to Clause 4.2 of the Agreement the investigations that lead up to prosecutions and “other formal accountability proceedings” (a term undefined108) should be “systematic, independent and impartial”. I will comment on all of these three predicates.

Afako develops the concept of “systematic” and notes that the investigations should “cover the range of violations arising in the conflict” and “identify the incidents or patterns most susceptible to proof”.109 This indicates that the prosecutor should at an early stage develop a picture of the whole in order to decide on a viable strategy. In this context, it is pertinent to mention that Clause 13 (b) seems to assure that the prosecutions shall focus not on just one type of crime or one geographical area, which is highly appropriate.110 Clause 13 (c) provides that crimes against women and children should be given “particular attention”. This should not necessarily mean that they be prioritised, but the particular nature of such crimes should be taken into account.

As indicated, the term “systematic” certainly implies that the prosecutor will have to conduct some form of mapping of the crimes before the more concrete investigations can proceed. Such a mapping could be based on the findings of a truth- and reconciliation commission (as is the case presently in Liberia), but no such results are available in Uganda today. Based on such a mapping the prosecutor will devise a strategy. In this exercise, other concerns will also be relevant. Reasons of economy indicate that prosecutions should not be too broad, i.e., one cannot always cover all crimes that a person appears to have been involved in. On the other hand, the interests of victims, as well as the general interest in having an authoritative

106 Currently, it is possible for the Minister responsible for internal affairs to exempt a person from the eligibility to receive amnesty, if hat is done “by statutory instrument made with the approval of parliament” (Section 2A, Amnesty Act, Cap 294, as amended in 2006). As far as can be ascertained, it is being discussed in the context of the implementation of the accords that the Amnesty Act shall be amended, and that there will no more unconditional amnesty.

107 Cf the reference in footnote 81. This is further corroborated by the Mediator’s guidelines, which envisage (or hopes for) “a single body for both investigations and prosecutions” (Guideline 20). See also Guideline 15, which speaks of “the most appropriate investigations and prosecution body” in singularis.

108 The term “formal accountability proceedings” as such probably encompasses both criminal and civil legal proceedings (adjudication), but this provision seems to be awkwardly applied to civil proceedings.

109 Afako 7.

110 The case of the prosecutions against Saddam Hussein is a well-known example. Saddam was executed before the Court had a chance to consider any of the crimes committed against the Kurdish population in Iraq, which caused distress among those segments.
account of the conflict, call for broad investigations. If a prosecutor would chose a pointed strategy, the interest in a comprehensive account of the conflict and the various atrocities could perhaps be satisfied through other means, such as reconciliation procedures, truth-telling, research, etc. One would further have to take prosecutorial strategy into account when establishing a procedure for reparation; victims of crimes that have not been prosecuted should not be in a disadvantaged position when they wish to claim compensation from a perpetrator or reparation under a reparations program. All of this necessitates case-selection criteria; while that will probably be for the DPP to decide, the political repercussions of any strategy justify a public discussion, as was the case with the strategy of the ICC’s Office of the Prosecutor.111

The next requirement in Clause 4.2 is that the institutions that carry out such investigations must be independent, which has to mean that they be fully independent of the political branches of the Government of Uganda. According to Clause 12 of the Annexure, the Director of Public Prosecutions (DPP) shall have overall control over the prosecutions. This proposition had much support during the Government of Uganda’s consultations with the people of Uganda during August and September of 2007 (to the extent that it was considered).112 The head of the unit should be a strong and independent-minded person.

Lastly, the adjective “impartial” indicates that the special unit shall make its decisions based on objective criteria, like those pertaining to the gravity of the crime in question and other criteria discussed above.113

Investigations and prosecutions might require special funding. It might also be useful to note here that the type of crime that the agreement deals with often is difficult to investigate, and that special expertise might be needed.114 Guideline 5 notes that training is needed for the implementers and Guideline 53 finds that personnel “should not be limited to nationals, as there is regional and international expertise on all aspects”, while the “national initiative” should be preserved. Clause 11 of the Annexure determines appropriately that the special unit should have a multi-disciplinary character.

**IV. Reconciliation and truth-telling**

As mentioned in the introduction, the A&R accords provide not only for formal criminal justice but also for reconciliation – which is a concept that might entail many different kinds of procedures.115 Clause 7 of the Agreement promotes both

111 The prosecutor of the ICC has, for reasons of economy, decided to pursue a strategy of only charging defendants with a sample of the crimes allegedly committed. Afako seems to have a similar view; see Afako 7, cited supra. The prosecutor of the ICC has devised criteria for the selection of cases based on gravity; see footnote 113.

112 The results of the consultations have not been published, but the author was present at both the Government of Uganda’s and the LRA’s consultations in Kampala, 26-27 September and 5 December, 2007, respectively.

113 The Prosecutor of the ICC takes a number of factors into account when assessing gravity, including “the scale of the crimes; their nature; the manner they were committed; and their impact”. ICC website, “Frequently asked questions: How does the Prosecutor decide where to intervene and which crimes to prosecute?” http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/FAQ/, visited on 3 March, 2009. A draft policy paper on these issues exists within the Office of the Prosecutor, but has not been published in final form.

These issues were recently the subject of a conference, “The Criteria for prioritizing and selecting core international crimes cases”, Friday 26 September 2008 09:00-17:00, organised by the Forum for International Criminal and Humanitarian Law, Oslo, http://www.prio.no/FICJC/Forum-activities/Criteria-for-prioritizing-and-selecting-core-international-crimes-cases/, visited on 20 March 2009.

114 Victims might be particularly traumatized, the lines of effective command necessary to establish, etc. The Institute for International Criminal Investigations, among others, organises training in this field. http://www.iici.org, visited on 2 March 2009.

115 The international literature on reconciliation and reconciliation procedures is vast, in particular if one includes wholly domestic procedures. For useful Internet sites on reconciliation in general, see Conciliation Resources (http://www.c-r.org). On reconciliation in a transitional justice context, see African Transitional Justice Research
collective and individual acts of reconciliation (7.2) as well as “truth-seeking” and “truth-telling” (7.3). As we will see soon, this is developed in more detail in the Annexure, but many issues are still left open.

It is sometimes implied that truth-telling and reconciliation is a local affair between LRA fighters and their victims (a far from clear-cut distinction, by the way) and, possibly, between the population and local UPDF units. However, the words “at all levels” in Clause 7.2 are intended to indicate that “reconciliation is not only a localised matter for the affected communities but has broader application”. The cross-cultural (or cross-tribal) implications, noted in Guideline 46, are also pertinent here. Afako further remarks that Clause 7.1 “allows reconciliation with respect to events outside Uganda”. Communities in Eastern and Western Equatoria in southern Sudan, as well as lately also in Northern DRC and the Central African Republic, have been much affected, as is well-known. It is unclear whether it would be possible for procedures to take place outside of Uganda. Be that as it may, if the parties so agree, and if the sovereigns concerned accepts that, there seems to be nothing to prevent reconciliation procedures to take place in other countries. At any rate, it is clear that the accords are not limited to reconciliation at the local or subregional level.

The quite vague concepts of the Agreement are developed in Clause 4 of the Annexure, which has the heading “Inquiry into the Past and related matters”. It stipulates the creation of “a body” which would appear to be a Truth and Reconciliation Commission (TRC) or something similar, although that term is never used.

As a general comment, the truth and reconciliation process must grow out of local needs and perceptions, and it is necessary that all stakeholders in Uganda have a sense of ownership, since the legitimacy of the procedure is crucial. In fact, the process of establishing a truth and reconciliation body often starts at the civil society level and should involve the affected communities. Such processes usually benefit from the growing accumulated international experience of the diverging group of bodies of this sort. The Refugee Law Project – attached to Makerere University – has drafted an ambitious National Reconciliation Bill.

The body to be created under Clause 4 has the following tasks assigned to it, which need to be listed before they will be commented on:

“(a) to consider and analyse any relevant matters including the history of the conflict;
(b) to inquire into the manifestations of the conflict;
(c) to inquire into human rights violations committed during the conflict, giving particular attention to the experiences of women and children;
(d) to hold hearings and sessions in public and private;

Network and International Center for Transitional Justice (www.ictj.org) and among actors in the area active in Uganda, see Conciliation Resources (http://www.c-r.org/our-work/uganda/index.php), Acholi Religious Leaders’ Peace Initiative (http://www.acholipeace.org – though that website does not appear to be fully operational), Beyond Juba Project (http://www.beyondjuba.org) and Justice and Reconciliation Project (http://www.justiceandreconciliation.com/).

116 “[P]rocesses of reconciliation shall be promoted at all levels”, see also Clause 2.3.
117 Afako 10.
118 Afako 8.
119 Clause 4:4: “For purposes of this Agreement, accountability mechanisms shall be implemented through the adapted legal framework in Uganda.” This is ambiguous, since it is not entirely clear whether “in Uganda” refers to the implementation or the framework. Nevertheless, the subject matter is not limited to what has taken place in Uganda. Clause 7.1: “The Parties shall promote appropriate reconciliation mechanisms to address issues arising from within or outside Uganda with respect to the conflict.”
120 Interestingly and possibly significantly, Clause 5 uses the expression “the body and any other adjudicatory body”, which grammatically indicates that this body is “adjudicatory”.
122 The bill is not public, although the drafting process has been semi-public.
(e) to make provision for witness protection, especially for children and women;
(f) to make special provision for cases involving gender based violence;
(g) to promote truth-telling in communities and in this respect to liaise with any traditional or other community reconciliation interlocutors;
(h) to promote and encourage the preservation of the memory of the events and victims of the conflict through memorials, archives, commemorations and other forms of preservation;
(i) to gather and analyse information on those who have disappeared during the conflict;
(j) to make recommendations for the most appropriate modalities for implementing a regime of reparations, taking into account the principles set out in the principal agreement;
(k) to make recommendations for preventing any future outbreak of conflict;
(l) to publish its findings as a public document;
(m) to undertake any other functions relevant to the principles set out in this agreement.”

To consider and analyse “any relevant matters including the history of the conflict” (a) is provided for also in Clause 2.3 of the Agreement, which calls for ”a comprehensive, independent and impartial analysis of the history and manifestations of the conflict”. A historical analysis is often an essential element of a reconciliation process, and it has to be carried out in a manner which is both objective and generally satisfactory to all parties. It has not been determined how this analysis should relate to the other elements of the A&R package. An historical analysis would be of value for all other parts of the A&R, from prosecution to reconciliation. But such an analysis will also benefit from the facts that will come out during the other processes.

This task might or might not be carried out in conjunction with the task to inquire into the manifestations of the conflict (b). “Manifestations” probably means the hostile acts rather than the underlying differences (conflict of interest, etc), which are covered by (a). The manifestations might, in turn, be related to the task in (c), “[i]nquire into human rights violations”,123 However, it might also be the case that this third task requires special expertise in human rights. It appears to not cover the acts of non-state actors (who arguably cannot violate human rights), but does clarify that abuses by the government side will be covered.124

As a procedural matter, I suppose, the Annexure also mandates the “body” to (d) hold “hearings and sessions”, which, of course, is necessary for it to fulfil its objects (a)—(c). To hold “hearings” is not necessarily the same as “truth-telling” (g), which refers to proceedings involving those directly involved (see the next section). Hearings could involve experts of various sorts, and be focused on certain issues. They do not have to be public, and a great many of them probably should not be public, in order to protect witnesses and others that might risk intimidation or worse. In that connection it is necessary to provide for special measures regarding witness protection and gender based violence, as provided for in subparagraphs (e) and (f).

As regards the truth-telling in communities (g), it is not clear whether it is the “body” as such or someone else (local authorities, communities) that will actually

123 In the Peruvian truth and reconciliation commission, for instance, these tasks were divided between different departments of the commission. Eduardo Gonzales Cueva, “The Peruvian Truth and Reconciliation Commission and the challenge of impunity”, in Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice 70, 79-80 (Naomi Roht-Arriaza, Javier Mariezcurrena, eds., Cambridge University Press, 2006).
124 This follows logically if one holds that only state actors can commit human rights violations. Even with a more liberal view, which allows that human rights violations can be committed also by non-state actors, it is the state one thinks of primarily as a human rights violator. Cf note 29. Hence, if one had not thought of the state as responsible, the term “human rights violation” would not have been the most appropriate one.
organise and conduct the truth-telling. Depending on the intended outcome of such a procedure, it might have to reach a certain level of professionalism, with trained statement-takers, in order to provide for fair hearings as well as to give a thorough analysis. It has been discussed whether truth-telling could take place within the format of traditional justice procedures, but it has also been averred that these are affairs between clans or families to such an extent that it might not be the whole truth that comes out but rather a negotiated story, which is not necessarily blatantly false, but not always completely truthful and comprehensive either. It is also important to note that there may be different purposes of truth-telling – to collect facts for the analysis, to provide an opportunity for victims and perpetrators to state their cases, to establish accountability, etc – and that these different purposes sometimes might require different procedures.125

Regarding the task to “promote and encourage the preservation of the memory of the events and victims of the conflict”, through memorials, etc (h), it is again not clear who will carry out this assignment. It could be implemented through commemorative events and memorials, as well as through museums, publications, archives and other accessible sources on the events. This task might be related to Clause 8.3 of the Agreement, which provides that victims have a right to “remember and commemorate past events affecting them”.

Yet another duty would be to collate information on the disappeared (i). States probably have an obligation to search for missing persons, since there is a vague right for kins to know of the fates of their loved ones.126

An important job for the body is to “make recommendations for the most appropriate modalities for implementing a regime of reparations” (j). This will be further commented below. While one may regret that the creation of a reparations regime will have to wait for the recommendations of the body, it is also the case that experience from other situations shows that a truth and reconciliation body can make very useful recommendations.127

To recommend measures for the prevention of future conflicts (k) is a useful task that is quite common for bodies of this sort. It is important that the powers that be actually put these recommendations on the agenda and deliberate on them appropriately.

The task to publish its findings (l) is necessary.128 It is likely that not everything can be published and that some information will have to be kept confidential, in particular in order to protect the safety of informers. It is to be hoped that undue political considerations will not play a part in the decision on what to publish and what not to publish. Accessibility is a very important consideration in this context; a version should be published in accessible language and at an affordable price.


Articles 32-34 of the First Additional Protocol to the 1949 Geneva Conventions provide that states shall take certain measures prompted by the right of families to know the fate of their relatives. Those rules apply in international armed conflict, and no similar provision appears in the Second Protocol on Non-International Armed Conflict. However, according to the study on customary international humanitarian law by the International Committee of the Red Cross, “[e]ach party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate. (Rule 117, cited in Henckaerts, Jean-Marie, “Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict”, ICRC Review 175, 208 (2005).
The Annexure provides that the individuals of the body shall be of high moral character and integrity and have the necessary expertise. The composition of this body will be crucial; some useful ideas have been elaborated in the Refugee Law Project’s draft, such as the method of selection, as well as rules safeguarding their independence and providing powers sufficient for them to fulfil their tasks.129

The relation between the body and other mechanisms will be reviewed below.

V. Traditional justice

Traditional justice mechanisms have been discussed widely in connection with the conflict in northern Uganda,130 and they have quite appropriately been given a prominent place in the accords. It is not clear, though, how they relate to formal mechanisms and even less clear how they relate to truth and reconciliation mechanisms; I will present some ideas in that regard at the end of this section. Furthermore, there are some inherent problems in the traditional justice mechanisms, which will be highlighted below.

Clause 3.1 emphasises that the traditional justice mechanisms shall have a central position in the framework, and this is confirmed by Clause 19 of the Annexure. Clause 20 of the Annexure provides that the “appropriate roles” for these mechanisms shall be identified, but does not say how or by whom; one may assume that it is the Government (the Cabinet with its ministries and subordinate authorities and/or Parliament) that is invoked. Clause 22 confirms the present voluntary character of these mechanisms, i.e., that a person cannot be forced to go through such a mechanism.

It is eminently clear that the traditional mechanisms can be very useful, in particular when it comes to integrating former combatants. So, wherein lie the problems? Clause 21 enumerates the traditional mechanisms mentioned in the A&R Agreement, and also mentions family and clan courts. Some important and potentially useful traditional mechanisms, such as gomo tong (“bending of the spears”) and nyano tongwenno (“stepping on an egg”) are not mentioned, however, which implies that the parties to the accords might not have thought through exactly what role the various mechanisms should play. Afako states that it “is principally for the communities to determine”, how they should be used while “[t]he exact workings and attitudes to traditional justice mechanisms need to be better understood before final conclusions are made as to their precise function”.131 Given the number and variety of stakeholders – not least the various communities – the words of caution seem to be highly appropriate.132

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129 The document has not been made public yet.
131 Afako 4.
132 The author has heard many exchanges between people from the affected communities about the content and function of the different processes, and there is no generally shared understanding in this respect. That is not, however, to say that it will be impossible to reach one; the discussion has yielded research projects and there are many written accounts of the process. One very illuminating review, accessible to the readers of this journal, is Owor Lino Ogora, “Traditional Justice: A Significant Part of the Solution to the Question On Accountability and Reconciliation in northern Uganda: A Case Study of the Acholi Local Justice Mechanism of Mato Oput, 5 Uganda Living Law Journal 282 (2007).
It is important in this context to make the distinction between rituals for the purpose of reconciling or atoning at the individual and the collective level, respectively. The Acholi ritual *mato oput* has been widely invoked in the context of the conflict, and has also been practiced, but it is not always understood what it means. Current references to *mato oput* sometimes conflate the traditional ritual with that name, in which the perpetrator as an individual is the protagonist, and *gomo tong*, which is the ritual to seal the resolution of communal conflicts between clans and tribes (and perhaps other groups as well),\textsuperscript{133} and *nyono tongwenno*, which aims at reintroducing a person into his or her community.\textsuperscript{134}

A related problem is that it is not entirely clear from the accords what the traditional mechanisms are supposed to provide – accountability, reparation or reconciliation, or perhaps all. The words “after full accountability” in Clause 1 of the Agreement is used in the definitions of all the traditional mechanisms (*ailus, culo kwor*, etc), but it is not explained what this means. It might mean that the traditional mechanisms shall be applied only subsequent to other mechanisms that provide “full accountability” (cf section VIII, below). But it might alternatively mean that these mechanisms as such do provide “full accountability”, which might obviate the need for further accountability proceedings.\textsuperscript{135}

Besides the heuristic difficulties – that the mechanisms are still poorly understood among many of the implementers – there is also the intercommunal problem. As the mediator notes, the issue of “cross-cultural violations and proceedings” has to be addressed. Different communities have different mechanisms, and while it may be possible to come up with procedures acceptable to all (as a number of traditional leaders in the north have pledged\textsuperscript{136}) it is crucial that all interests are taken into account. It is, for instance, fairly clear that for the affected Langi and the Iteso it will not suffice to have the former combatants (most of them Acholi) go through the Acholi *mato oput* procedure.\textsuperscript{137}

Furthermore, these procedures were originally designed for “ordinary” crimes and conflicts within communities or between neighbouring communities, and may not be appropriate for all of the crimes committed during the present conflict. The traditional rituals might also be of limited utility for reconciliation outside the traditional, rural context in which they were developed; many people who have fled from villages to cities plan to remain in urban settings. Another problem, implicitly recognised in Clause 21 of the Annexure, is that the traditional mechanisms have not involved women equally to men and have thereby reinforced old paternal structures.\textsuperscript{138} At any rate, this needs to be researched.\textsuperscript{139}


\textsuperscript{136} See, for instance, the recommendations of the Wider Northern Uganda Leaders, Gulu, 20 December, 2007, on file with the author.

\textsuperscript{137} Afako also implies that there may be other communities, besides those cited in the Agreement (Acholi, Lango, Iteso, Madj) that are concerned (Afako 11).

\textsuperscript{138} Traditionally, also the remedies were highly gendered. For instance, a typical compensation for a killing would be the giving away of a women from the offenders’ clan to the victims clan, whereby that woman would bear a child which would be given the name of the deceased. Liu Institute for Global Issues, Gulu District NGO Forum, Ker Kwero Acholi, *Roco War I Acoli: Restoring Relationships in Achooland: Traditional Approaches to Justice and Reintegration* 56 (2005), available at: http://www.lii.ube.ca/?p=2=modules/liu/publications/view.jsp&id=16, visited on 20 March 2009. No one has to my knowledge suggested that such compensation would be applied in the present context. There is also a growing awareness of these aspects.

\textsuperscript{139} Research is being conducted by a number of organisations and institutions, including the Refugee Law Project and the Justice and Reconciliation Project in Gulu.
In spite of all these difficulties, the traditional mechanisms may be of value in several circumstances, as voluntary complements to the formal criminal justice system under the Constitution of Uganda. It is important to remember that their character as voluntary and the “paying” of reparation rather than serving of a sentence actually make them more similar to out of court settlements in tort cases than to criminal procedures. In some cases their use would be recognised by the formal system, while in many other cases the traditional processes will continue in a completely informal way. Firstly, it is exceedingly clear that they have a role in the reintegration of former combatants into their communities, and in such cases the processes will surely be conducted without interference or reference from the formal criminal justice system. However, submission to a traditional procedure may also be taken into account in sentencing before formal courts, and they might play a role in a reparations scheme (see below) as well as possibly in a truth process. One might further envisage that in the future traditional processes might be used through “diversion” from the formal criminal process for less serious crimes, though that would hardly apply to the Juba framework. (See also section VIII.)

If their role should be recognised in the “formal”, modern world – Ugandan courts, World Bank supported demobilisation and reintegration, etc – then there will inevitably have to be criteria for what counts as an acceptable procedure, etc, and this raises the question if and how these mechanisms should be codified, and what that might mean to the position and role of these mechanisms. Clause 5.4 of the Agreement states that all A&R processes shall be promoted “through existing national institutions”, but “with necessary modifications”. This indicates that it is not necessarily so that the traditional mechanism will be accepted as they are, but that they might have to be adapted. One should note in this context that traditional mechanisms may change (“traditional” does not mean “static”). Whether such development should be left only to the communities concerned or whether intervention from the formal system is appropriate remains to be seen.

VI. Victims

Clause 8 deals with victims in a quite ambitious way, in line with the very welcome trend in international criminal law to recognise the rights and interests of victims; this is surely to be accredited in large measure to the vocal representation during the negotiations of local communities in the affected areas. “Victim” is defined in Clause 1 of the Agreement as not only persons who have directly suffered, but also those who have suffered collectively. The category of victims does not seem to be limited to persons that have been the direct objects of the acts in question, but might cover also relatives of direct victims. Further, there is arguably a threshold, since the affected person has to have “adversely suffered harm” (my emph.).

This corresponds by and large with international definitions. While there is no general definition of “victim” in international law, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Law are also a form of accountability, and the paying of damages has a certain deterrent effect. The comparison is admittedly a bit forced, but if the traditional processes are to be subsumed under principles such as “no double jeopardy”, then it has to be made.

The Constitution would still apply, though, since participants in such processes should be protected from coercion or any other abuse, as always.

Serious crimes will be prosecuted before the War Crimes Division and individuals guilty of less serious crimes will surely continue to be eligible for amnesty.

Since “harm” means “adverse impact”, “adverse” seems superfluous. However, if one assumes that every word in the agreement has a purpose and a meaning, then “adverse” would seem to reinforce “harm”, so that it does not cover insignificant negative impact.
Humanitarian Law, adopted by the UN General Assembly in 2005, provides in paragraph 8 as follows:

“victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omission that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”

The Rules of Procedure and Evidence of the ICC are considerably briefer: Rule 85 provides that “Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.” One possible difference between these definitions concerns the causality between the concrete acts of belligerents and the sufferings. The UN text uses the words “through acts or omissions” whereas the Agreement speaks of “a consequence of crimes and human rights violations”, which might suggest a relation between the harm and the act that is in line with the Rome Statute (“a result of”) but less strict than the UN text. As implied, this formula of the Agreement might possibly cover also people who have suffered as a consequence of the situation as a whole, such as IDPs. At any rate, the numbers will be very high, given the large amount of people who have been directly affected even by a strict standard – for example, 49% of Acholi have been subjected to abduction according to a recent survey.

Clause 8 of the Agreement opens with a useful reminder of the need to acknowledge and address the suffering of victims (Clause 8.1). Victims should be taken into consideration in several respects: their influence on proceedings, their capacity to give evidence as witnesses, their need for protection and their right to reparation. The right to reparation will be dealt with in the next section, but the other three aspects will be touched upon here.

In Clause 8.2 the Government of Uganda is obliged to promote “effective and meaningful participations” of victims in accountability and reconciliation. Consequently, the Annexure provides in Clause 8 that the special division of the High Court “shall make arrangements to facilitate the protection and participation of witnesses, victims, women and children”, while Clause 24 enjoins all bodies implementing the agreement to “establish internal procedures and arrangements for protecting and ensuring the participation of victims, traumatised individuals, women, children, persons with disabilities and victims of sexual violence in proceedings.” It appears necessary to both make allowance for such participation in the rules that will govern the various proceedings and allocate resources for that purpose, in particular in cases where victims will need to travel and be lodged away from home. Recall further that Clause 3.7 of the Agreement states that “[v]ictims participating in proceedings shall be entitled to be legally represented.” As indicated supra (section

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144 The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNGA RES 60/147).

145 My emphasis in both quotations. It should be noted in this context that an earlier draft of the Basic Guidelines carried the words “as a result of”, which is on the broader side of the spectrum. It was controversial within the UN Commission of Human Rights whether collective suffering should be covered or not. See “The right to a remedy and reparation for victims of violations of international human rights and humanitarian law: Note by the High Commissioner for Human Rights”, UN Doc E/CN.4/2004/57, p 8, para 31 and p 21, para 9.

146 See When the War Ends, Human Rights Center of University of California at Berkeley, Payson Center for International Development at Tulane University and International Center for Transitional Justice 30 (2007), available at http://payson.tulane.edu/research/reports/pdf/When_The_War_Ends.pdf, [hereinafter When the war ends].
III.A.5), it might be necessary to provide for legal counsel to victims, in the likely event that they cannot afford that.

Guideline 33 asks in this context whether victims should have “the right to draw the attention of investigators to issues which require investigation.” It seems difficult to envisage that victims would be prohibited from communicating with investigators, but it might be useful to facilitate such communication, for example by requesting the investigators to actively solicit the views of victims. Afako further observes that victims will “need to know what and when proceedings are proposed”, which requires procedures for adequate notice.\(^{147}\)

Clause 8.2 also states that participation by victims must be consistent “with the rights of the other parties”, i.e., the alleged perpetrators, who, i.a., have the right of a fair trial.\(^{148}\) This might possibly refer to the very difficult balancing that must be done between a victim-witness’s right to security – for instance by being anonymous – and the rights of the accused to be able to challenge the prosecutor’s evidence. This is a problem which has prompted procedural innovations in the tribunals for Rwanda and former Yugoslavia, and has also been reflected in the Rome Statute of the ICC and its rules of procedure and evidence.\(^{149}\)

The “dignity, privacy and security” of victims shall be protected under Clause 8.4 of the Agreement; that issue has been commented on above with regard to witnesses (section III.A.5 on Clause 3.4).

**VII. Reparations and civil claims**

Perhaps the most important parts of the accords as they relate to victims are those on reparations. Clause 9.1 of the Agreement enumerates the established various forms of reparation – “rehabilitation, restitution, compensation, guarantees of non-recurrence and other symbolic measures such as apologies, memorials and commemoration”.\(^{150}\) This corresponds to the usual meaning given to “reparation” in international law. Firstly, rehabilitation and restitution\(^{151}\) both aim at reinstating the status quo ante, by rehabilitating a person or by, for instance, returning a piece of property. Secondly, since that is often not possible, compensation is an alternative for that which cannot be reinstated. It is important here to notice that “reparation” is the more generic term, and that, for instance, compensation is one form of reparation.\(^{152}\) The third group, various forms of symbolic measures, aim to repair that which cannot so easily or appropriately be repaired with material means, such as trust or honour.

I will here start by discussing reparations in general, then briefly review already applicable ways for victims in Uganda to receive reparations and lastly look at the applicable provisions of the accords.

As far as human rights violations are concerned, international human rights law obliges states to provide reparation\(^{153}\) and so does the Constitution of Uganda.\(^{154}\) This definitely covers all abuses committed by the government side, while it is uncertain whether it also applies to LRA atrocities, although it can well be argued

\(^{147}\) Afako, p 11.

\(^{148}\) See comments to Clause 3.4 of the Agreement, section III.A.5.

\(^{149}\) See footnote 98 as well as rules 16-19 and 85-93 and *passim* in the Rules of Procedure and Evidence of the International Criminal Court.

\(^{150}\) See, for instance, Article 75 of the Rome Statute of the International Criminal Court.

\(^{151}\) In classical international law governing relations between states, “restitution” is the term used, while rehabilitation refers to acts on an individual level.

\(^{152}\) See footnote 150.

\(^{153}\) See, for instance, Article 9 of the International Covenant on Civil and Political Rights and Article 8 of the Universal Declaration of Human Rights as well as the UN “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Human Rights Law”, UNGA RES 60/147.

\(^{154}\) See Article 50 (1).
that human rights law provides a duty for the government to protect, and that the Government of Uganda should pay for its failure to do so.  

There is overwhelming evidence that the victims of the war want reparations, and often in the very concrete form of money. When asked “what should be done for the victims”, 56.2% of the people taking part in the populations based survey “When the war ends” responded “financial compensation”, whereas an additional 23.2% mentioned other quite tangible goods like food, cattle and education. Reparations is also called for by local and national leaders in Uganda.

Reparations would fulfil many purposes. Foremost, of course, they could provide individualised and targeted relief for victims directly injured by conflict-related crimes. Reparations would also constitute recognition to the individual that that person has rights, and that s/he has suffered an infringement of those rights. Furthermore, and this might be particularly useful for reconciliation at the national and societal level: Providing reparations would entail an acknowledgement by the government of wrongdoings and failures – for concrete crimes carried out by the UPDF or other governmental agencies, or for the failure by the state to carry out its core duty to protect its people. Reparations are thus different from regular development assistance, which is supplied at the discretion of the donor, and which in general is not directed at specific individuals or groups affected by crimes.

Reparations will also be a crucial aspect of other parts of the peace-process. For instance, traditional procedures (mato oput, etc), assume as a necessary element that compensation is paid. Furthermore, reparations to victims play an important part in the reintegration of former combatants, by preventing the perception that the combatants have been privileged at the cost of the victims. Reparations should, if possible, be forthcoming relatively quickly, in order to contribute to early recovery of trust and provide relief for many of those suffering the most.

Is it not possible to claim reparations at present? Ugandan victims of violations of human rights and international humanitarian law can make claims before national courts, but corruption, prohibitive costs, etc, make this a less realistic road for the vast majority of victims. The Uganda Human Rights Commission (UHRC), which may also provide compensation, is a better route in most cases, but the lack of enforcement of the UHRC’s decisions is notorious, and it is unclear whether the Commission’s present procedures are suited for mass

155 See Andrew Clapham, Human Rights Obligations of Non-State Actors 361-365, 387-388, 434 and jus cion (2006). The case cited on p 434 is particularly interesting, since it concerns a ruling in the African Commission on Human and Peoples’ Rights, in which Chad was found to have breached the African Convention on Human and Peoples’ Rights by not protecting its people against atrocities committed by rebels (Commission Nationale des Droits de l’Homme et des Libérites v Chad, Comm. 74/92).

156 When the War Ends, supra note 146, p 35. See also Office of the UN High Commissioner for Human Rights, Making Peace Our Own: Victims’ Perceptions of Accountability, Reconciliation and Transitional Justice in northern Uganda 47-48 (2007).


158 See Andrew Clapham, Human Rights Obligations of Non-State Actors 361-365, 387-388, 434 and jus cion (2006). The case cited on p 434 is particularly interesting, since it concerns a ruling in the African Commission on Human and Peoples’ Rights, in which Chad was found to have breached the African Convention on Human and Peoples’ Rights by not protecting its people against atrocities committed by rebels (Commission Nationale des Droits de l’Homme et des Libérites v Chad, Comm. 74/92).


160 The author was present at a training on reparations for civil society and local government in Pader on 11 June, 2008, organised by the Office of the United Nations High Commissioner for Human Rights (UNOHCHR). It was striking that the participants held the government equally responsible with the LRA for the atrocities inflicted by the rebels, and virtually unanimously believed that the government should provide reparation.


163 See footnote 86.
claims. Thus, if the UHRC were to be employed for this purpose, its procedures might have to be adapted.

The Government of Uganda has averred that the Peace, Recovery and Development Plan for northern Uganda (PRDP) would constitute adequate reparation. However, while the PRDP surely would go a long way towards addressing grievances in the north, it would not be an adequate form of reparation. As mentioned, reparation entails an acknowledgement that someone has done something wrong to someone, and it is an entitlement, not a handout. The PRDP has no provision for reparation in the sense outlined here, although reparations could possibly – but very unlikely – be partly subsumed under programmes 1.1 or 4.1/4.2.

The States Parties to the Rome Statute for the ICC have established a Victims’ Trust Fund, which has opened operations in northern Uganda. It has so far furnished both collective reparations and individual reparations to victims of maiming. It is unclear to what extent the fund will be able to give relief to victims, but it is clear that it will not be in a position to cover more than a fraction of the harm.

What follows then from the terms of the agreement? To begin with, as already mentioned, Clause 6.2 states that “allegations of gross human rights” shall be “adjudicated” by “[f]ormal courts and tribunals established by law”. As has been discussed in section III.A.1, this most likely refers to civil claims, rather than criminal prosecutions. It has already been mentioned in this section, that that avenue is already open under Ugandan law. However, since this clause refers to gross violations, one would ask how violations of human rights that are not gross shall be processed. The UHRC already has jurisdiction over all human rights violations, at least in as much as the state is concerned, and the jurisdiction of regular courts to try torts claims against the state appears not to be limited to gross violations of human rights. It could surely not have been the intention for Clause 6.2 to change that.

Hence, one could conclude that this Clause is redundant. On the other hand, its presence reminds the implementers that the right to claim damages for at least gross human rights violations should be specifically taken into account in the implementation.

References:

163 The Former Minister for Internal Affairs and Head of the Government Delegation to the peace talks, Ruhukana Rugunda, has said so on many occasions.
165 Government of Uganda, Peace, Reconstruction and Development Plan for northern Uganda 2007-2010 (PRDP), 23 & 74-76 (2007). If under program 4.1/4.2, it would fall under the rubric “Local Peacebuilding Structures”. (It is unclear whether Mediation and Reconciliation is included under 4.1 or 4.2.; cf PRDP pp. 74-75 with p. 108.)
166 According to the Constitution, the Uganda Human Rights Commission (UHRC) shall, i.a., “investigate … the violation of any human right” (Article 52(1)) and it may order compensation or “any other legal remedy or redress” (Article 53(2)). See also the Section 8.1.a, Uganda Human Rights Commission Act, Cap 24. The UHRC has dealt with a few cases involving individuals, for instance relating to torture by state agents and some family matters.
167 This follows from case law. See also footnote 86.
168 Perhaps it would be to strain these provisions too far to try to give them a too detailed content; after all, the vagueness might reflect a vagueness of purpose that should not be allowed to restrict the legitimate implementers – Parliament – too much. There are cases where the legal commentator best refrains from giving an opinion about positive law and just lets the law unfolds, as it were.

Here is another open question. Note that 6.1 pertains to crimes “during the course of the conflict”, while 6.2 refers to violations “arising from the conflict”. It is unclear whether the difference is intentional or not, and it is equally difficult to determine which term is the wider one. In the practice of the International Criminal Tribunals for former Yugoslavia and Rwanda, the courts have determined that there must be a link between the armed conflict and the conduct, and it appears that it suffices that the conduct took place “in the course of fighting” or “because of the conflict”. See Knut Dörflmann with contributions by Louise Doswald-Beck and
This somewhat nebulous provision notwithstanding, there are provisions explicitly focused on reparations. Clause 9.2 states that “reparations should be made to victims”.

They may be “collective as well as individual”, “through mechanisms to be adopted by the Parties”. Individual reparations is a concept well developed in domestic law as far as it applies to damages for “ordinary” crimes and torts, although the application of that concept will surely have to be adapted to the current context of mass crimes. 169 Obviously, full compensation, as provided in a civil tort suit, is an unattainable ideal in a situation of mass crimes. Collective reparations, on the other hand, which is a less developed concept, 170 may be justified for various reasons – the commonality in much ownership in northern Uganda, the “common experience of communities” 171 as well as the need to hold back administrative costs (it may be difficult and time-consuming to determine the loss for each single victim). 172 Most likely, a viable reparations scheme will have to combine simplified individual reparation and collective reparation.

As a matter of international human rights law, a reparations scheme probably could not replace the right for an individual to go to court and demand damages from any person or entity responsible for that harm. Clause 9.3 appropriately states that “[r]eparations may be ordered to be made by perpetrators as part of penalties and sanctions in accountability proceedings.” This, presumably, refers to both civil (torts) and criminal processes. However, as mentioned, in the vast majority of cases, the option to go to court will not be available to victims. 173 In order to be functional, a reparations scheme would have to be quicker and more summary than ordinary court proceedings. The burden of proof would be lower, amounts given out in compensation would have to be standardised, and individual compensation for some types of harm (sexual slavery, killing, maiming, etc) might have to be combined with collective reparations for other types of suffering (forced displacement, loss of livelihood, etc). In addition, at the communal/collective level reparations could – and probably should – include such symbolic and political measures as the erection of monuments, the giving of apologies (also at the highest level) and assurances that atrocities will not be repeated. Another issue that will have to be addressed is how to deal with the gap between the limited resources and the potentially high expectations. 174 This will have to be managed with a professional outreach programme.

Robert Kolb, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary 18-28 (Cambridge University Press, 2003), see in particular pp 26-27. This means, in my understanding, that to use the language of the Juba Agreement, war crimes are crimes which appear “during the course of the conflict” and/or “arising from the conflict”. It is to be recalled that by far most of the atrocities have taken place outside of regular combat, and therefore a wide scope seems preferable.

One related interesting issue which might be noted here is whether the amnesty really covers all crimes committed “during the course of the conflict”. The term used in the Amnesty Act is “any crime committed in the cause of the war or armed rebellion” (Section 3(2), The Amnesty Act, Cap 294). This seems to imply that only acts which have a relation to the strategic and tactical goals are covered, and that might exclude many instances of rape, for instance. It is beyond the scope of this article to go into that question in any detail. 149 It is foreseen in Guideline 39 that individual reparations will be determined in accountability proceedings.

169. Of course, compensation given to a state in an international proceeding is a collective reparation in a sense, since the state represents (or embodies) the population. The state is an established subject of international law, however, whereas in this case reparations could be given to groups that are less well-defined under international law, such as a village, a clan, or the inhabitants in a parish or a county.

170. See Afako 13. Afako notes wisely that no explicit focus was made on reparations should be made to victims.

171. These issues have been explored to some extent in the context of the ICC’s Trust Fund for Victims, which regulations were adopted in 2005. Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3, available at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Trust+Fund+for+Victims/Regulations+of+the+TFV/Regulations+of+the+TFV.htm, visited on 20 March 2009.

172. The courts are unavailable because of distance, backlogs, costs, corruption or because the burden of proof in a formal proceeding would be too high.

173. See Afako 12. Afako notes wisely that not every type of harm will be compensated “to the true extent of the loss”.

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In addition, another crucial question is which body will be responsible for administering claims and disbursement of compensation – the Human Rights Commission, local courts, traditional justice mechanisms, some new mechanism?

Clause 9.1 provides that priority shall be given to “vulnerable groups”, but it is not explained what that means; it could pertain to women and children, to social groups (the poorest) or to the ethnic groups that have been most exposed to the violence (foremost the Acholi). 175

Reparations may, according to Clause 9.3, “be paid out of resources identified for that purpose”. It is unclear to the present author what that means. It might refer to a future trust fund for victims in the conflict in northern Uganda. 176

According to Clause 16 of the Annexure, the Government shall establish “financing and other arrangements” for reparations. Clause 28 of the Agreement on Comprehensive Solutions provides that “the Government shall establish a special fund for victims, out of which reparations shall be paid, including reparations ordered to be paid by an institution established pursuant to the Agreement on Accountability and Reconciliation.” 177

At any rate, any meaningful reparation – individual or collective – will most likely have to come from funds provided by the Government of Uganda and development partners, since neither the LRA and most of its members nor most individual members of the forces on the Government side will have the funds necessary to pay damages. The Government of Uganda will, of course, be responsible for its own damages, but might perhaps cover also damages for which the LRA or individuals are held responsible, either ex gratia or because it was liable for its failure to protect the population. 178 For some actors – like development partners – it might appear difficult and even pointless to distinguish between collective reparations on the one hand and the “usual” donor activities of development assistance and humanitarian assistance, DDR (disarmament, demobilisation and reintegration), etc. However, as mentioned, for many victims, the concept of reparation has the added value of carrying a recognition of the suffering that has been inflicted upon them. From that perspective, it is probably important that the responsible entities – be it individuals or the Government of Uganda – provide at least some of the means, so that it is clear that the culprits have had “to pay for their deeds”.

These are quite difficult questions that require more research, but there are plenty of experiences from other situations to draw from. 179 The annexure does not provide any details. Instead, it will be for “the body” (“TRC”) to develop general principles (Clause 4 (g) of the Annexure) while the Government is tasked to work out the details as provided in Clause 17 of the Annexure. 180 At any rate, given both the complexity of the exercise and the necessity for grounding in the wills of the

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175 Afako implies that it is women and children that were on the minds of the negotiators (Afako 13). In the Agreement on Comprehensive Solution, Part 12 deals with “vulnerable groups”. Although the concept is not defined, it appears to cover several categories of children but also widows, female-headed households, disabled, people with HIV/AIDS and the elderly.

176 Cf Guidelines 36-38. Regarding the mediator’s question in Guideline 38 on the relation to the fund provided for in the Agreement on Comprehensive Solutions, I believe that a fund established under that agreement might usefully share financial management with the A&R fund, but the criteria for the distribution of the funds will be quite different for the two envisaged funds.

177 Cf footnote 227.

178 See footnote 155.


180 Clause 18 – which says that “[i]n reviewing the question of reparations, consideration shall be given to clarifying and determining the procedures for reparations” – states the fairly obvious, that procedures will have to be considered.
victim communities and other stakeholders, it is essential that thorough consultations take place.

VIII. Choice of forum, relation between procedures and referrals

With so many mechanisms involved – formal criminal and civil procedures, perhaps courts martial, truth- and reconciliation processes, traditional justice and reparations – a crucial question is: which case goes where?

Clause 5.2 of the Agreement provides that the parties “acknowledge the need for an overarching justice framework that will provide for the exercise of formal criminal jurisdiction, and for the adoption and recognition of complementary alternative justice mechanisms.”\(^{181}\) It is not entirely clear what this means, but it does suggest wisely that there is a need to coordinate the various mechanisms.\(^{182}\) This is recognised also in the Mediator’s Guideline 6, which says that the implementers should provide for “systems for referrals within the adopted system”, and Guideline 14 notes that the procedural relationship between alternative mechanisms and formal systems has to be clarified. The possibilities are many: The relation can be sequential or concurrent, through decision taken by different decision-makers, based on substantive legal criteria or by discretion. Unfortunately, there is not much clarification in the accords, which even appear to be contradictory in this regard, as I will argue below. It is therefore to be welcomed that a single body – JLOS – has been tasked with making proposals for the whole scope of the A&R accords.

What concrete guidance has JLOS been given in the A&R accords? Clause 4.3 of the Agreement provides that the choice of “forum for adjudication” shall depend, “amongst other considerations, on the nature and gravity of the offending conduct and the role of the alleged perpetrator in that conduct”. In so far as criminal prosecutions go this has been made more precise by the provisions referred to in the discussion concerning the jurisdiction of the High Court, the courts martial and the DPP in section III.A.2. Furthermore, there is, of course, also already plenty of Ugandan law that regulates which forum has jurisdiction over a particular criminal case. These existing laws apply, save for when they have been explicitly excluded in the accords or through the effects of the Amnesty Act (which was never dealt with explicitly in the accords). The upshot of these various rules is that those on the governmental side – including local defence units -- that are not subjected to prosecutions in the High Court (be it the WCD or an “ordinary” division) might go to court martial,\(^{183}\) and those on the non-state side will not be prosecuted at all -- unless an amendment to the Amnesty Act limits the scope for amnesty considerably.\(^{184}\) However, according to Afako, the provision is supposed to cover also “administrative processes as well as community based and traditional processes” (Afako 8), although that reading seems to go beyond the usual understanding of the

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\(^{181}\) The latter encompass, in accordance with Clause 5.3, traditional justice processes, alternative sentences and reparations.

\(^{182}\) This is confirmed in Afako’s commentary, which says that the Agreement seeks “[a]n integrated and coherent system which deals in an effective, differentiated and efficient manner with all accountability and reconciliation issues arising out of the conflict”. Afako 9, referring to Clauses 5.2, 5.6 and 14.3.

\(^{183}\) Recall that Clause 23 of the Annexure, discussed in section III.A.2, refers only to “serious crimes”. Thus, even if my conclusion is correct that serious crimes will not be prosecuted before courts martial, the military tribunals might still have a role regarding less serious crimes.

\(^{184}\) If the eligibility to receive amnesty is substantially limited, then the less responsible fighters on the LRA side might even be prosecuted before magistrate courts, depending on the gravity of the charges.
Hence, the clause is intended to supply a general principle to assist legislators.

What about the relation between the formal criminal justice processes and truth-telling and processes administered by “the body”? The formal criminal justice system will have jurisdiction over the most serious cases, but that does not prevent the other fora from being relevant also to these cases. Clause 5 of the Annexure stipulates that “the body” should give precedence to formal justice mechanisms, which presumably means that if the DPP wants to prosecute, it shall have the authority to do so, even if the person concerned contemplates undergoing some sort of truth and reconciliation or traditional justice procedure under the authority of “the body”. However, what does precedence mean in relation to other processes which occur after the formal criminal justice process? A TRC could have the authority to subpoena someone to appear before the commission and give evidence, and such evidence might be vital even if that person has already been prosecuted in a formal criminal justice procedure. I will return to that question shortly. Clause 5 of the Agreement appropriately stipulates that “detailed guidelines and working practices shall be established to regulate the relationship”. The exchange of information between the DPP and the truth and reconciliation body is one such vital matter.

Another issue, much discussed, is the relation between the formal criminal processes and traditional justice procedures. The latter are often conceived of as being complementary to and not alternative to formal justice mechanisms; the traditional procedure is for the purpose of reintegration and local reconciliation, and that cannot be provided in a formal process. It has happened on a number of occasions that a traditional procedure – like mato opot – has been utilised with respect to a person that wants to return to his/her community after having served a prison sentence. This is unproblematic, since the process is voluntary, and since it results in civil damages rather than punishment, as has already been noticed (section V). On the other hand, the traditional accountability procedure may also be incorporated in the formal criminal justice system in one way or the other. If the results of a traditional accountability procedure shall be taken into account in the sentencing of non-state actors, it is obvious that it will have to take place prior to the formal procedure. It is also possible to involve local communities in the formal criminal justice system, for example in the decision and the execution of sentencing, as has been implied above (see section III.A.3). This could involve a full traditional justice procedure before the trial or at any other stage of the criminal justice process.

In this context, and relevant to both truth-seeking and traditional procedures, it should be mentioned that if the prosecutor decides to have a pointed strategy and only prosecute a suspect for a limited number of acts, then there might still be a need for truth-telling and traditional procedures about other crimes committed by that person. In my view, that should meet no obstacle.

Compounded to these complexities is the cumbersome provision in Clause 3.10, which I hinted at in section III.A.3. It needs to be quoted in full.

“Where a person has already been subjected to proceedings or exempted from liability for any crime or civil acts or omissions, or has been subjected to accountability or reconciliation proceedings for any conduct in the course of the conflict, that person shall not be subjected to any other proceedings with respect to that conduct.”

185 According to Wikipedia, visited on 4 December 2008, adjudication is “the legal process by which an arbiter or judge reviews evidence and argumentation including legal reasoning set forth by opposing parties or litigants to come to a decision which determines rights and obligations between the parties involved.”

186 It was discussed at quite some detail during the Fairway conference. For an account of “the path to accountability and reconciliation”, Fairway, supra note 10, 22-23.

187 It would be problematic only if it involved coercion or any other element that would violate the rights of anyone.
In as much as this clause protects people from facing a criminal trial twice for the same act it is unobjectionable. However, if it excludes a civil action, a statement before a truth telling body or a traditional process after a criminal trial, or a criminal trial after a civil action, truth telling or traditional process, then it is deeply problematic. It has several alternative grounds for exempting a person from proceedings, and this appears to exclude a great number of offenders. First of all, “subjected to proceedings” might cover also proceedings which have been terminated for some reason unrelated to the finding or not of guilt, for example the escape of the accused. The second alternative ground for exclusion, “exempted from liability”, might apply to the amnesty procedure; in that case, this provision is legitimate in as much as it has the approval of Parliament, but still problematic in light of the obligation to fight impunity. One notes in this context the preambular provision of the Agreement, which contains a commitment to prevent impunity “in accordance with … international obligations’. This is a recognition of the fact that international law requires states to prosecute (some) international crimes as well as to protect human rights by suppressing violations thereof.

The third ground for exemption is even more problematic. It says that a person who has “been subjected to accountability or reconciliation proceedings for any conduct in the course of the conflict” may not be subjected to “any other proceedings with respect to that conduct”. This seems to mean that a person that has gone through a traditional or a truth-telling process is immune from criminal liability. This can be legitimate – though not necessarily in accordance with international law – regarding perpetrators with a lesser degree of responsibility. However, if it means that any suspect of serious crimes who subjects him- or herself to a traditional procedure – for instance mato opat or the different and quite light nyano tongwenno189 – is exempted, then it is highly dubious. To incorporate traditional mechanisms in the procedure and the sentencing is one thing, but to accept the traditional mechanisms as a full and exhaustive substitute for formal civil and criminal mechanisms is a completely different matter. That would surely violate the right of an individual victim to seek redress, and it might also violate the state’s obligation to repress violations of human rights and international humanitarian law.190 Hence, it appears that the precedence for formal justice can be circumvented by a person if that person reports to any other process. Clause 3.10 thus seems to contradict much of the A&R accords, since it potentially puts accountability under the control of the suspected perpetrator.

In addition, one must add that this “double jeopardy”-provision goes far beyond the Constitution. It is clear from the language of Article 28.9, cited in III.A.3, that double jeopardy applies between criminal proceedings, and not across different kinds of proceedings, and this is also how the principle is generally applied. The different proceedings that could come into play in the present context are all different in nature. The right of a victim to claim damages in a civil suit is not affected by a criminal prosecution, and the opposite applies, too. Secondly, a traditional process is essentially a settlement out of court in a case of civil liability. Further, and crucially, the traditional process is voluntary, and it cannot be envisaged that a convicted offender shall be barred from submitting him- or herself to a traditional procedure for purpose of his or her reintegration into the community after having served a sentence. Thirdly, a truth-telling process is essentially an administrative process. A voluntary appearance before a truth-commission poses no problem at all. A summons to appear before such a commission is a coercive act, but is not to be assimilated to a criminal procedure. An individual may be summoned to

188 See footnote 31.
189 On the traditional procedures, see further section V.
190 See footnote 31.
appear before different bodies – including as a witness in a trial – and that is not held to be double jeopardy issue.

The potentially far-reaching and surprising effect of Clause 3.10 could be resolved via a careful disaggregation of that provision, in order to determine which effects are legitimate and do not contradict the rest of the accords, and which aspects just have to be set aside.\textsuperscript{191} At any rate, Clause 3.10, like most of the A&R Agreement and Annexure, is not applicable without a signed Final Peace Agreement. Even though there are excellent reasons to implement the A&R accords even in the absence of such a signature, this does not have to extend to a provision that appears to contradict much of the rationale of the accords. The underlying purpose of this provision was to provide finality and closure, and that can be provided through other means. The formal truth-telling process will surely be limited, since any such body will have a limited mandate. The time frame for prosecutions and civil claims can be limited by law, which may provide, for instance, that any prosecutions or civil claims arising out of the conflict will have to be made within three years. By contrast, the traditional procedures cannot, by their nature, be subjected to such a limitation.

Be that as it may, as a minimum, the DPP should be able to quickly “pick and choose” its suspects and initiate proceedings, and such proceedings – at whatever stage – should then be determined to have priority even if the suspect during the investigations submits him/herself to another procedure. This would require swift action by the DPP, which in many cases might be difficult for a conscientious prosecutor who needs sufficient proof before a process is initiated.

Another way of doing it might be to have a strong mechanism decide in advance and with binding effect to which forum a person should be referred. Such a procedure could be connected to the DDR process, but that assumes that all former combatants assemble in the assembly area or, as a minimum, report in accordance with Section 4(1)(a) of the Amnesty Act.

As a last matter in this context, Clause 4.4, which says that the agreement should be implemented “through the adapted legal framework in Uganda”, seems to indicate that the accountability mechanisms shall not be implemented under foreign or international law or in foreign fora.\textsuperscript{192} This means, for instance, that the parties would not accept foreign prosecutions as an implementation of the accords. However, the parties cannot limit the right of third states to prosecute international crimes, in particular when the offender is present on that third state’s territory.\textsuperscript{193} Nevertheless, many foreign states will probably be willing to extradite offenders to Uganda, provided that they will be subject to adequate accountability procedures in Uganda.\textsuperscript{194}

It is evident from the foregoing that the precise relationship between formal justice institutions and reconciliation processes – as well as with the work of the Amnesty Commission -- is a complex issue. Experiences from other countries, such as the different routes taken by neighbouring Sierra Leone and Liberia, are important.\textsuperscript{195}

\textsuperscript{191} An alternative reading might be to hold that Clause 3.10 applies only to proceedings that have already taken place at the time of signing or entry into force of that agreement. In my view, that is not the most plausible reading, though.

\textsuperscript{192} This is confirmed in Afako 8.

\textsuperscript{193} In cases of torture and grave breaches of the Geneva Conventions, that is even an obligation. See footnote 31.

\textsuperscript{194} Compare also Clause 14.5 of the Agreement, which might cover such cases. It enjoins the Government of Uganda to “[u]ndertake any necessary representations or legal proceedings nationally or internationally, to implement the principles of this Agreement.”

\textsuperscript{195} For one of many analyses on the relation between the Truth and Reconciliation Commission and the Special Court in Sierra Leone, see Marieke Weirda, Priscilla Heyner and Paul van Zyl, “Exploring the Relationship between the Special Court and the Truth and Reconciliation Commission of Sierra Leone”, the International Center for Transitional Justice (2002), on file with the author.
IX. Gender issues, women and children

Clause 10 on gender is quite short and provides that the implementers “shall strive to prevent and eliminate any gender inequalities that may arise.” This useful though quite abstract provision concerns the application of the whole agreement.\textsuperscript{196} It might, for instance, constitute a reminder that reparation – and in particular collective reparation – not only should avoid creating new inequalities, but also has to be provided in such a way that it does not uphold existing gender inequalities; for instance, a compensation to a female victim should be given to that person and not to a male head of the family. This is also highly relevant for traditional justice, as has already been noted.

While gender issues in principle pertain to both men and women, given the situation at hand, women would seem to be the main beneficiaries of the vague Clause 10. In addition, it is specifically provided in Clause 11 for the protection of women and girls as particularly vulnerable groups; “[s]pecial needs of women and girls” should be catered for according to paragraph (i). Such issues may arise in connection with reparations, as well as in the various A&R procedures where sexual crimes have to be dealt with\textsuperscript{197} (see Guideline 41) and in the reintegation of female LRA members or abductees. Paragraph (iii) provides that the dignity, privacy and security of women and girls should be protected, and this is needed not least in connection with sexual and other gender crimes. Further, the parties shall (ii) ensure that “experiences, views and concerns of women and girls are recognised and taken into account”. This is necessary in the planning of the proceedings, but also in the working-out of the implementing regulations, as reminded in paragraph (iv). Women should not only be protected as victims but also empowered as agents.\textsuperscript{198} Women’s groups have been quite active in the negotiations and the consultations,\textsuperscript{199} which have nevertheless been dominated by men.

Part 12 on Children is similar to the preceding part on women and girls. Two provisions are added. Litera (iv) provides that “children are not subjected to criminal proceedings”. The effect of this provision depends on the definition of “child”. The UN Convention on the Child determines that anyone under the age of 18 is a child.\textsuperscript{200} While that definition is accepted in the Ugandan Penal Code, it is also stipulated that children are criminally accountable from the age of 12.\textsuperscript{201} International law certainly does not forbid criminal accountability for all persons under 18,\textsuperscript{202} However, in the present context, where children culprits generally are (former) abductees, and where the large majority of perpetrators will not be prosecuted, it might not be inappropriate to completely exclude children under 18 from criminal judicial proceedings. This would mean that the Amnesty Act would continue to apply to them.\textsuperscript{203}

\textsuperscript{196} Afako’s comment confirms this reading: “Failure to adopt gender guidelines can result in the perpetuation of inbuilt biases and unequal protection of the rights arising from the agreement” (Afako 13).
\textsuperscript{197} At present, a woman that has been subjected to rape has to get a special form (Police Form 3, “PF3”) prior to any medical examination that is to be used in court, and women are frequently charged both for the form (l) and for the examination. Office of the United Nations High Commissioner for Human Rights, Access to Justice in northern Uganda 33 (2008).
\textsuperscript{200} Article 1, Convention on the Rights of the Child.
\textsuperscript{201} Section 88, the Children’s Act, Cap 59.
\textsuperscript{202} See Article 40, the Convention on the Rights of the Child, \emph{e contrario}.
\textsuperscript{203} Afako 14.
In (v), the agreement provides that “appropriate reparations” shall be promoted with respect to children. It is assumed that this could relate to special measures for the care of orphans, for the rehabilitation of abductees, and for assistance to girls subjected to sexual abuse, etc.

The welcome provision in Clause 24 of the Annexure enjoins all implementing bodies to “establish internal procedures and arrangements for protecting and ensuring the participation of victims, traumatised individuals, women, children, persons with disabilities and victims of sexual violence” This will no doubt necessitate the involvement of experts on gender issues, child issues, etc. Apart from this clause, the Annexure does not develop the rules on gender, women and children.

X. The ICC factor

As seen, the accords provide many useful features, although exactly how useful depends on the yet un(der)determined implementation. The most important factor on the minds of the delegations was, however, the ICC factor, as already averred. Clause 14.6 of the Agreement obliges the Government of Uganda to “address conscientiously the question of the ICC arrest warrants relating to the leaders of the LRA/M”. Perhaps directed at the same issue, Clause 14.5 provides, a bit nebulously, that the Government of Uganda should “[u]ndertake any necessary representations or legal proceedings nationally or internationally, to implement the principles of this Agreement.” This could refer to measures that need to be taken to avoid criminal proceedings against LRA personnel in foreign states and before the ICC, but it could also function as a catch-all provision with very uncertain reach.

At any rate, focusing on the ICC, it now seems clear that the Court in The Hague cannot and/or will not withdraw the arrest warrants or otherwise stop the proceedings unless the principle of complementarity is fulfilled. According to Article 17 of the Rome Statute of the International Criminal Court, that principle is satisfied in any of the following cases:

-- if the case is being investigated or prosecuted by a State which has jurisdiction over it,

-- if the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, or

-- if that person has already been tried for conduct which is the subject of the complaint.

This applies with the important caveat that the State is not unwilling or unable genuinely to carry out the investigation or prosecution, or that the State has not carried out the investigation or prosecution in a way which displays unwillingness or inability, as the case may be. Hence, Uganda has to show that it is both willing and able genuinely to investigate and prosecute. What does that mean in more concrete terms?

- Uganda most likely needs to have legislation that allows prosecution for all or at least the great majority of the different counts charged against Kony et al. Therefore, all those charges should be covered by Ugandan law. I have already discussed that issue at length (see above, section III.A.1).

- There need to be resources and expertise at hand to conduct effective investigations and prosecutions, because otherwise the ICC might doubt the ability of Uganda to pursue the prosecutions (see further above, section III.B).

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204 Afako 15; see also supra on Clause 4.4, section VIII.
205 This was emphasised by Justice Ssebutinde of the Special Court for Sierra Leone during the Abu Mayanja Memorial lecture on 6 August, 2008. Daily Monitor 2008-08-08, p 3.
• The sentences would likely have to be appropriate, because otherwise it could be averred that the Ugandan proceedings will be undertaken to “shield” the perpetrators or be inconsistent with an intent to bring the perpetrator to justice, as discussed above, section III.A.3.

• It is arguably, but far from certainly, the case that the principle of complementarity as such does not prevent the ICC from accepting that Uganda applies the death sentence in these cases. The ICC does not apply the death sentence, but that punishment is not prohibited under general international law. However, there might nevertheless be difficulties involved, in particular if Uganda wants to cooperate with the ICC in order to avail itself of evidence that the ICC has collected. The ICTR may not transfer persons to national jurisdictions if they might face the death penalty. There is no corresponding provision in the Rome Statute which explicitly prevents the ICC from cooperating with states that might subject a suspect to the death penalty. However, such cooperation is discretionary on the part of the ICC, and the ICC might refuse to cooperate if the suspects may face capital punishment. Be that as it may, in order to secure assistance from other countries – many of which oppose the capital punishment – Uganda might want to provide other punishments for these cases. Lastly, and perhaps most importantly, it will be considerably less attractive for LRA commanders to disarm and report if they may face the death penalty, and it has been generally understood that the death penalty would not apply to the LRA.

• As just mentioned, in order to successfully prosecute on the counts brought up by the ICC Prosecutor, Ugandan authorities might want to use evidence and information gathered by the Office of the Prosecutor (OTP). The OTP will, in such cases, surely require guarantees that the information is not misused and, in particular, that witnesses and victims are protected. This follows from Article 93.10 of the Statute and quite clearly from Rule 194 of the ICC’s Rules of Procedure and Evidence. Furthermore, in addition to such practical exigencies, protection of witnesses and victims is required under Clauses 3.4, 8.4, 11(iii) and 12(iii) of the Agreement and Clauses 3(c) and 8 of the Annexure. (See also above, section III.A.5.)

• It is probably the case that the principle of complementarity as such does not require that international standards of fair trial are being respected. However, the eyes of the world will be on Uganda from the beginning of the investigation, and it needs to be ensured that these standards are respected. While Ugandan law in general satisfies high standards in this respect, and such guarantees follow from both the Constitution and the A&R Agreement, commentators have cautioned that the independence and integrity of the process has to be ensured (see above, section III.A.5).

• Likewise, it is probably the case that the principle of complementarity as such does not require that victims have a standing in the process, including a right to claim reparation. However, since the Rome Statute provides for an


208 Cf footnote 81. It is obvious that if the death penalty were not to be applied for the severe crimes alleged to have been committed by the LRA, the raison d’être of the capital punishment in Uganda will be put into question.
unprecedented degree of involvement of victims, and since the peace and justice debate in Uganda has been very victims oriented, it appears to be highly advisable that Ugandan law be amended to correspond to ICC standards. (See also above on the relevant provisions of the accords, sections III.A.5 and VI.)

- One matter which has been discussed to some extent, but which is only indirectly related to the A&R accords, is the issue of immunity. The ICC Bill is intended to both codify the international crimes into Ugandan law and provide for cooperation with the ICC, and the problem of immunity arises in both instances. Since this matter is peripheral to the analysis of the A&R accords, but still of interest, I have decided to deal with it in a footnote.

- Lastly, and arguably most importantly, Uganda must show that it has — or perhaps it will suffice that it be shown that Uganda will have Kony et al in custody. In the decision on the arrest warrant, the ICC Pre-Trial Chamber found that the cases against Kony and the others were admissible, and noted that “the Government of Uganda has been unable to arrest ... persons who may bear the greatest responsibility” for the crimes within the referred situation. It is difficult to know whether it would suffice if Kony were under the control of, say, the authorities of the Government of Southern Sudan or an international force, but it appears to be very unlikely that the Pre-Trial Chamber would be satisfied if he and the others were at large in Garamba National Park in the Democratic Republic of the Congo.

At any rate, the ICC will not be able to respond to the present A&R accords as such; a lifting of the arrest warrants can take place only when the procedures are in place and are being applied to the remaining three indicted LRA leaders. To do all of this may take time. Therefore, it has been foreseen that the Government of Uganda ask the UN Security Council to adopt a resolution that defers prosecutions for a renewable period of one year, in accordance with Article 16 of the Rome Statute of the ICC. In line with this understanding, a time-table has been developed in the Agreement on Implementation and Monitoring Mechanisms (the Implementation Agreement), which provides for a transition period of one month which can be extended by another month (see section XI, below). During that period, the

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210 It is indirectly related, in that it is sometimes demanded that criminal responsibility should be applied equally to both sides, and that would probably include also categories of personnel usually covered by immunity.

211 The Constitution provides in Article 98(4) that “[i]f a person is present in that court shall not be liable to proceedings in any court.” Therefore, as regards the criminal provisions of the ICC Bill, Ugandan law will not allow substantive criminal proceedings against the President. This is in contrast with the Rome Statute, which allows prosecutions of sitting presidents and any other office holders. Hence, while Uganda upholds its domestic law immunity, the customary immunity for incumbent foreign heads of state under international law is lifted under the Rome Statute. This means that Uganda will not be able to prosecute a sitting President, and will thus not be able to invoke the principle of complementarity in the case that the ICC would issue a warrant of arrest for a Ugandan president. Whether that omission to prosecute would also constitute a breach of international law depends on the circumstances.

As regards the duty to cooperate, including by surrendering persons to the ICC, the Bill makes no exception for the President. However, a procedure for surrendering a Ugandan president would no doubt involve “proceedings in [a] court”, since it is for magistrates to decide under Section 26 of the Bill. Hence, it appears that there is a contradiction between the Bill and international law on the one hand and the Constitution on the other, and, under the prevailing doctrines in Uganda, it is likely that that conflict would be resolved in line with the Constitution. Hence, an amendment of the Constitution might be called for.

213 The Agreement on Cessation of Hostilities as well as the Agreement on a Permanent Ceasefire provided that the LRA — without exceptions — be camped in Ri-Kwangba prior to the disarmament process.

214 Article 17 of the Rome Statute requires that the case “is” or “has been” investigated and/or prosecuted. It does not suffice for Uganda to be ready to investigate.
government shall “give priority to commencing criminal investigations and establishing the special division of the High Court” and “request the UN Security Council to adopt a resolution … requesting the International Criminal Court to defer all investigations and prosecutions against the leaders of the Lord’s Resistance Army". For the LRA, it is provided that “[d]uring the Transitional Period, the LRA shall observe the Permanent Ceasefire agreed upon and fully assemble in Ri-Kwang-Ba” and “[t]he DDR process shall begin after the Transitional Period.”

It appears to be the impression in some quarters that the LRA will need to implement its part of the agreements only if and when the UN Security Council (UNSC) adopts a resolution which defers the prosecutions. That is not correct. As appears from the clauses cited above, the Implementation Agreement does have a very implicit tit-for-tat since the Government shall request the UNSC to adopt an Article 16 resolution during the transitional period, and the disarmament process starts only after this period. However, and this is important, no provision in the agreement is explicitly or implicitly conditioned on the UNSC actually adopting such a resolution; it is only stipulated that the Government of Uganda shall make an effort, but if it fails, the DDR regulations are still binding for both parties.

The Implementation Agreement also makes it clear that the request to the UNSC shall be based on steps taken to establish national mechanisms of accountability, thus implying that it is far more likely (or less unlikely) that the UNSC adopt a resolution as requested if the Government of Uganda can make a case that it will succeed in a later complementarity challenge before the ICC.

XI. Implementation of the accords

Under this rubric, I will deal with two different issue areas: The legislative and administrative implementation measures that the Government should take within specified periods of time and the mechanisms through which oversight and consultations should take place, i.e., through which parties and actors other then the Government of Uganda should be involved. Both the time periods and the mechanisms are provided for most comprehensively in the Agreement on Implementation and Monitoring Mechanisms.

Clause 4.4 of the A&R Agreement, which I referred to in section VIII, provides that accountability mechanisms shall be implemented through the adapted legal framework in Uganda. The term “adapted” indicates that amendments to existing legislation might be needed and points forward to the next clause. In a similar spirit, the ensuing Clause 5.1 first establishes that the laws of Uganda are good enough, and then asserts that they may nevertheless need to be modified.

How and when will changes be introduced? In Clause 5.6, the Government of Uganda promises to make the necessary changes in legislation, policies and procedures, but the second element of this clause also implies – as a reminder – that it is Parliament that makes the decisions in many cases. Clause 2 of the Annexure stipulates that the Government shall develop the legislation, etc, “urgently”. This urgency is further developed in the Implementation Agreement; Clause 36 of that Agreement provides – with a clear view to the ICC factor – that “[d]uring the Transitional Period, the Government shall urgently take the necessary steps to establish national mechanisms of accountability and reconciliation as are provided for in the Agreement on Accountability and Reconciliation. In this regard, the

215 Clauses 36 and 37 of the Implementation Agreement.
216 Clauses 40 and 41 of the Implementation Agreement.
217 See Clause 37 compared with Clause 36. The two clauses are cited in and around footnote 220.
218 This Agreement was not a part of the original five point agenda.
219 In order to not prejudice the already existing legal competence of the ICC, it is clarified that this applies “[f]or purposes of this Agreement".
Government shall give priority to commencing criminal investigations and establishing the special division of the High Court.”

Will the implementation involve the creation of new mechanisms? Clause 5 of the Agreement elaborates certain aspects of the former Clause. According to Afako, this part expresses “a preference for existing mechanisms, albeit with necessary modifications” in order to avoid “the complications, delays and costs entailed in the establishment of new institutions”. These are very valid considerations, provided that the existing institutions are reasonably well-equipped to perform the new tasks (which assessment is beyond the scope of the present paper). To build on existing structures will not only save time and money, but also generally increase the legitimacy of these institutions. It might also provide an opportunity to introduce reforms of such institutions which might be useful also outside of the present Juba framework.

Regarding the various institutions that may be involved, comments have already been made above concerning the formal justice mechanisms (the High Court, the Director for Public Prosecutions, Uganda Police Force). It was also noted that in particular the truth- and reconciliation aspects were not assigned to any specific existing institution, but that it is provided for the establishment of a special “body”. Nevertheless, although the agreement does not explicitly determine that they shall be given a role, Clause 5.5 of the Agreement recognises the Ugandan Human Rights Commission and the Ugandan Amnesty Commission (AC) as being “capable”. As Afako notes, for them to be employed, “substantive and procedural modifications would be required”. Therefore, even though the Human Rights Commission and the Amnesty Commission are not given any concrete tasks, Clauses 14.3-4 provide that the Government should adopt necessary policies and legislation in the Amnesty Act or the Human Rights Act. It is likely that there is a role for the UHRC envisaged, in particular with regard to less serious human rights violations that do not constitute international crimes. The Amnesty Commission will have its role as the first civilian government body that many former LRA combatants and captives meet, and it could have a role beyond that, but most likely only with regard to non-state actors.

All of this will no doubt require new resources. Clause 13 of the Agreement realistically provides that the Government shall not only avail but also solicit resources – likely from development partners – for the implementation of the Agreement.

What is the relation between the various agreements and the other instruments involved in the implementation of the accords? In Clause 14.2 it is provided that the other agreements between the parties shall be consistent with the present one. We have already noted that the Agreement trumps the Annexure in the sense that the Annexure cannot prevent the Agreement from being implemented fully. But there are also important linkages between the matters covered in this agreement and other agenda items of the peace negotiations. For instance, there might be a need for Security Sector Reform in Uganda, as indicated in Part 8 of the Agreement on Comprehensive Solutions. Such reform might build on facts that come out in the open during the A&R process. One aspect of such reform -- vetting

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220 Clause 37 provides: “On the basis of the steps taken under Clause 36 of this Agreement, the Government shall request the UN Security Council to adopt a resolution under Chapter VII of the Charter of the United Nations, requesting the International Criminal Court to defer all investigations and prosecutions against the leaders of the Lord’s Resistance Army.”

221 Afako 8.

222 Afako 9.

223 Note the remarks made in and around footnote 166 as well as in section VII.

224 It is presently mandated only to deal with non-governmental “reporters”.
– is particularly closely connected to accountability.\(^{225}\) Furthermore, as noted, disarmament, demobilisation and reintegration should be coordinated with A&R, since people that need to go through a DDR process will often also be subject to an A&R procedure. One further has to think about the balance between benefits given to former combatants in a DDR package and the reparations given to victims, some of which are also combatants.\(^{226}\) It is difficult to see any necessary contradiction between these agreements,\(^{227}\) and, if any would arise, conflicts between obligations will have to be resolved through the usual legal methods.\(^{228}\)

When it comes to conflicts between existing or future legislation and the accords, the matter is particularly difficult. Of course, acts passed by Parliament have the force of law in accordance with the Constitution of Uganda, while the status of the Agreements under international law or the Constitution of Uganda is hard to determine.\(^{229}\) It seems difficult to imagine that Parliament would feel a legal obligation to comply with agreements which it has had no chance of effectively overseeing; it is to be hoped, though, that Parliament will feel a political obligation or appreciate the expediency in implementing the accords.

I will now turn to the monitoring and consultation framework. Consultations are different from monitoring in that their focus is not on reviewing and assessing past implementation (or non-implementation) but rather on future implementation. Nevertheless, monitoring and consultations have in common the fact that they provide roles in the implementation for actors other than the Government of Uganda, including the LRA, civil society and the international community. Compared to many other peace agreements, the involvement of these actors is quite weak in the Juba accords.\(^{230}\) These issues are dealt with most comprehensively in the Implementation Agreement, but there are also scant provisions in the A&R accords as well as in the Agreement on Comprehensive Solutions on this subject.

First of all, the parties have agreed in the A&R Agreement that there is a need for continuous consultations with local and national stakeholders concerning the implementation of that Agreement.

“The Parties agree that at all stages of the development and implementation of the principles and mechanisms of this Agreement, the widest possible consultations shall be promoted and undertaken in order to receive the views

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\(^{225}\) The purpose of a vetting process is to determine which persons are suited for work in an institution (such as the armed forces or the police), and people who have been found guilty of serious crimes might not be found appropriate for such posts.

\(^{226}\) See supra, footnote 160 and accompanying text.

\(^{227}\) Afako notes that Clause 7 and Clause 13 of the Agreement on Comprehensive Solutions are relevant (Afako 14). Clause 7 deals with the judiciary and the rule of law, and it is difficult to foresee any contradiction between this Part and any good faith implementation of the A&R Agreement. Clause 13 provides that the Government of Uganda shall “mitigate the effect of losses of livestock taking into account individual losses”. This provision does not deal with reparation in a legal sense, but it seems appropriate to take any re-stocking into account when calculating reparations. The means of ascertaining the individual losses would also be similar to what is necessary in a reparations process.

\(^{228}\) This conclusion is drawn from a comparison with peace-agreements from 28 conflicts, compiled by and on file with the author.

\(^{229}\) These issues are dealt with most comprehensively in the Implementation Agreement, but there are also scant provisions in the A&R accords as well as in the Agreement on Comprehensive Solutions on this subject.

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and concerns of all stakeholders, and to ensure the widest national ownership of the accountability and reconciliation processes. Consultations shall extend to state institutions, civil society, academia, community leaders, traditional and religious leaders, and victims.”

It is important to note that the duty to consult is not limited to the period prior to the negotiation of the Annexure – during which the parties did hold consultations – but extends all through the implementation. The Annexure does not develop the concept of consultations but stipulates in Clause 3 that the Government of Uganda shall take into account representations from the parties “especially any findings arising from the consultations undertaken by the parties”. This appears to condition the input from stakeholder on the parties taking their views on board. However, that was probably not the intention of the provisions, which most likely was intended to ensure the continued influence of the LRA on the implementation. At any rate, this provision in the Annexure cannot limit the scope of the above cited clause of the Agreement.

These provisions on consultations do not have any geographical parameters. By contrast, “widest national ownership” is sought. This leaves open the question whether the most affected communities, have a position as privileged stakeholders, but Guideline 55 suggest that the parties in their consultations shall “give particular consideration to the views from communities affected by the conflict”. It is not stipulated how the representatives of the various groups shall be selected.

Another relevant provision is Clause 17 of the Agreement on Comprehensive Solutions, which provides for a specific forum, namely a Stakeholders’ Conference:

“After the final Peace Agreement has been signed, the mediator in consultation with the parties shall convene a meeting in Uganda comprised of political, Civic, Religious, Traditional leaders etc. to sensitize them on the provisions of the agreement, their role in its implementation and to disseminate the information to the grassroots.”

This does not seem to envisage consultations as such, since sensitization is more of a one-way sort of communication, but it appears highly unlikely that the participants of such consultations would be content with just being sensitized. At any rate, regardless of what is being provided in the accords, there are surely no legal obstacles to convening conferences and other meetings of any sort with stakeholders. Such meetings might usefully be developed into a standing mechanism for consultations with the affected populations.

Secondly, the Agreement on Implementation and Monitoring Mechanisms would establish two bodies for monitoring, involving the international community and the LRA, respectively. This clearly is an implementation of Clause 2.5 of the A&Rs Agreement:

“The Parties … shall adopt effective measures for monitoring and verifying the obligations assumed by the Parties under this Agreement.”

Already Clause 15.2 of the A&Rs Agreement let the mediator “provide additional guidance” for the parties to consider and consult upon with regard to the annexure. The Mediator has very usefully and comprehensively done so, as has been mentioned. The Annexure further involves the mediator in a weak monitoring mechanism; Clause 26 provides that “[t]he mediator shall from time to time receive or make requests for reports on the progress of the implementation of the agreement.”

231 Clause 2.4 of the A&Rs Agreement.
232 The list of invitees to the previous consultations as well as the Stakeholder’s meeting in November, 2008, and the conference at Fairway Hotel in May, 2008, as well as the list of observers to the peace talks can, of course, provide guidance.
233 A Stakeholders conference was convened at short notice in Munyonyo on 5 November, 2008. It did not deal with the implementation of the agreements, though, but with the issue if the outstanding signature of the FPA.
However, the two mechanisms of the Implementation Agreement have the potential of being considerably more effective. The first body is the Oversight Forum, which would consist of the mediator, the UN envoy and the observers. The observers represent both African countries (often with legitimate security interests, such as the DRC) and donors (like the US and the EU). The Forum will oversee and monitor as well as provide advice. It will address disputes between the parties or otherwise and may request reports. Its reports and findings shall be made public. The creation of the Forum would enhance local confidence in the process and strengthen international support and involvement, including by the UN. There appears to be no obstacle to creating this mechanism – or something very similar to it – even in the absence of a signed Final Peace Agreement, although its mandate might have to be adjusted, to include issues referred to it by a stakeholders’ forum.

The second body is the Joint Liaison Group (JLG), to be composed of representatives of the two parties. It is mandated with the following functions: to monitor implementation of the agreements, to make recommendations to the Government or other implementing agencies on the implementation, to supply the Oversight Forum with regular briefings and to make recommendations to the Chief Mediator concerning the holding of a stakeholders’ conference. Furthermore, “[t]he Government and the JLG shall refer to the Oversight Forum any issues arising from the working of the JLG.” If the FPA is not signed, it appears unlikely that this group will be created. It might be claimed that the LRA/M negotiating team is no longer a credible counterpart.

This monitoring setup is weaker in many respects from other peace agreements. Neither body has any executive function, and consequently neither the other party in the peace negotiations (the LRA/M) nor the UN or any other representative of the international community has any direct power in the implementation of the agreements. The small part played by the LRA can be explained by its weak military position and by its miniscule political legitimacy. However, various international bodies are expected to play key roles in the implementation of the agreement, and the affected communities are surely major stakeholders. It is to be hoped that the Government of Uganda makes the most of the provisions in the agreements that would give all stakeholders important roles in the design and monitoring of the accords.

XII. Final Comments

The Juba Peace Agreements are the first peace agreements anywhere that have been negotiated in the shadow of ongoing investigations or prosecutions by the ICC. The Juba talks have had to navigate in a context in which some previously open avenues for peace-agreements had been closed by the indictments, such as comprehensive amnesty. This is a reality that will have to be faced by more and more peace negotiators in the future -- many will no doubt deplore that, while others will see new opportunities.

But of course, the peace process in Uganda is not only a laboratory in an international and transnational learning process, it is also an effort to deal with very real problems for very real people, who are more interested in the results on the ground than in the development of international criminal justice, transitional justice, peace-building or any other intellectual doctrine. For them it has been a process of

234 Clause 12 of the Implementation Agreement.
235 Clauses 8-10 of the Implementation Agreement.
236 Clauses 26 and 27 of the Implementation Agreement.
237 This conclusion is drawn from a comparison with peace-agreements from 28 conflicts, compiled by and on file with the author.
negotiations which have involved not only the two parties to the peace talks, but also a number of other actors, with various interests, based in the NGO hub of Gulu, in the IDP camps, in Kampala, and in various metropolis around the world. And that process was far from over when the A&R accords were finalised in Juba.

At any rate, Uganda is a laboratory for the practical handling of the principle of complementarity.

At a recent seminar, Cambridge University PhD candidate Sarah Nouwen presented her preliminary findings of the “catalysing effect” in Uganda of complementarity. She found that the ICC process had entailed a number of effects in Uganda (though not exactly the ones that were frequently predicted). Most importantly, a real peace negotiation process was initiated in Juba, which produced a panoply of useful (though sometimes vague) provisions on how to reach accountability and reconciliation in Uganda. If this turns out right, it might correspond to Fabius Okumu-Alya’s prescription that one “should link together in an inseparable synergy the restorative/traditional, official and international justice mechanisms.”

The world looks on and will learn from what happens in Uganda. If successful, this process will serve not only its primary beneficiaries in Uganda but also future potential victims of maiming, killing, sexual slavery and mass displacement the world over. No solution can be transplanted wholesale from one place to another, but modes of thinking, toolboxes and principles can, if applied wisely. After all, people are in essence the same, everywhere.