

LAWFARE: WHERE JUSTICE MEETS PEACE

*The Honorable Principal Judge of Uganda,
Justice James Ogoola**

I. INTRODUCTION

It is a singular honor to speak at this symposium on lawfare. I thank most deeply the organizers of the symposium for their forward-looking stance in choosing this evocative topic for a theme. In many senses, lawfare is the opposite, indeed, the very antithesis of warfare. “Warfare” is the ancient, primitive, and largely discredited mode of dispute resolution between nations and among peoples. “Lawfare,” on the other hand, has all the civilized undertones of letting the law fare well in the struggle to achieve peaceful resolution of disputes. It has the ring of due process, of the doctrine of the rule of law, and rule of reason—of the principles of fairness, equity, and justice in bringing a peaceful end to a violent conflict. We have Case Western Reserve University’s erudite minds to thank for this creativity and genius of christening our theme.

Permit me, then, to add to this creative form here at Case Western my own spurious contribution to the eminent topic before us. I have titled my paper: “Where Justice Meets Peace.” A little introduction could be appropriate to provide a brief background to the situation in Uganda, which is the backdrop for this thesis.

For close to twenty-four years now, there has been a hot and horrid war raging in Northern Uganda, that is the part to the south of Sudan and the west of the Democratic Republic of the Congo. The war has seen innocent millions butchered or bludgeoned to death, the stomachs of pregnant women ripped open with crude machetes (a cousin of the sword), lips, limbs, and ears of old men lobbed off their emaciated torsos, the noisy tongues of the inquisitive, yanked (root, stem, and all) out of the garrulous mouth.¹ Young boys, as young as ten, caught in a spiral of mass abductions

* James Ogoola is the Principal Judge of the High Court of Uganda. The following is a piece prepared by Justice Ogoola in participation with the September 10, 2010 Lawfare! symposium at Case Western Reserve University School of Law and is in part based on his personal experiences.

¹ See Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, ¶ 5 (Sept. 27, 2005), available at <http://www2.icc-cpi.int/iccdocs/doc/doc97185.PDF> (alleging that since 1987, the Lord’s Resistance Army has carried out insurgent operations against Uganda’s government, army,

and transformed into the war's killer monsters, for example, the "child soldiers."² Young girls, as young as twelve, kidnapped en masse from local schools and forced into sexual slavery on the brutal war front to become babies-bearing-babies, impregnated by butcher generals of the bush—thereby begging the Hobson's question of: "To bear or not to bear the child alive?"³ Either way, the poignant trauma of it all is simply unbearable.

This specter of horror continued without cessation over the Greater North of Uganda, and in chunks of the North West, and parts of the East of the country flowing over into the neighboring Countries of the Democratic Republic of the Congo, Sudan, and the Central African Republic.⁴ This way, a local rebellion within Uganda's borders ballooned into an international war fought on multiple battlefields across international boundaries. Truly, the crimes committed in this theater of war too, have explored into international crimes by any definition—crimes without borders, violations beyond borders.

The land, weary of mass slaughter and mass maiming, the landscape, littered with hideous mounds of the fallen, and hapless multitudes of the widowed and the orphaned, cried out in lamentation for peace, almost peace at any price. The Juba Peace Talks were orchestrated by the two principals: the Uganda Army of the Government and the Lord's Resistance Army (LRA) of the Bush warlords; and supported by the international community.⁵ Agenda item No. 3 of the Juba Peace Talks sought to establish

and populace by brutalizing civilians, burning homes, and abducting children to force them into military service).

² See *id.*; see also *Crises in Sudan and Northern Uganda: Hearing Before the H. Subcomm. on Int'l Operations and Human Rights and the Subcomm. on Africa*, 105th Cong (1998) (testimony of Jemera Rone, Human Rights Watch) (describing the story of Charles, a thirteen year-old boy who was abducted on Christmas day, 1996, and who was forced to kill with a machete other boys who tried to escape); Grace Matsiko, *LRA Chief Kony Asks the UN for Clothes*, MONITOR (UGANDA), Nov. 25, 2006 (noting that rebel leader Joseph Kony demanded clothes for people aged zero to twenty-five, but denied that his forces had any children in their custody).

³ See Kathryn Westcott, *Sex Slavery Awaits Ugandan Schoolgirls*, BBC NEWS, June 25, 2003, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/3019838.stm> (reporting that the older female captives are raped and the younger girls are forced into domestic labor).

⁴ See generally Office of the United Nations High Commissioner for Human Rights, *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Congo Between March 1993 and June 2003* (Aug. 2010) [hereinafter *DRC Mapping Report*], http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf.

⁵ Beyond Juba, *Conflict, Justice and Reconciliation in Teso: Obstacles and Opportunities, Briefing Note No. 1*, BEYOND JUBA, 2 (Dec. 2008), http://www.beyondjuba.org/briefing_papers/Teso_Briefing_Note.pdf (presenting a background for understanding the Juba Peace process and the means to reaching peace in Teso); *Declaration of the Stakeholders' Consultation on the Juba Peace Process*, BEYOND JUBA, ¶ 4 at 2 (Nov. 5, 2008), http://www.beyondjuba.org/peace_agreements/Declaration_of_

Three Pillars for Peace in Northern Uganda: (i) a formal Court mechanism of largely punitive justice, to punish impunity; (ii) a Traditional system of, largely restorative justice, to restore harmony and co-existence through apology and forgiveness; and (iii) a Truth-telling mechanism/forum, to get the entire populace debate the whys, hows, and wherefores of the underlying causes of Uganda's interminable wars, rebellions, insurrections, insurgencies, upheavals, civil strife, coups d'état, etcetera.⁶ As the negotiating positions of the protagonists became more and more intractable, the desperate question became between peace without justice or justice without peace?

The choice for the country was clear. We needed both—for one without the other would be but a mirage: unattainable, unsustainable, and unfulfillable! Accordingly, the architects and diplomats and legal agencies crafting the peace deal in Juba had to find that elusive point at which justice meets peace. Difficult decisions were made on the spot to have the widest possible consultations on the issues, as well as for deep-seated research into the problem. A blue ribbon Transitional Justice Working Group was formed under my Chairmanship as Principal Judge of the Country, comprising all relevant Government Ministries and agencies, as well as the legal fraternity in Uganda (both Public and Private practitioners), Academia, the Civil Society, the Elders throughout the countryside, Religious Leaders, and all other similar stakeholders.⁷ The Group, ably assisted by international legal experts, notably the Public International Law & Policy Group's Professors Michael Scharf of Case Western University and Michael Newton of Vanderbilt University, produced the necessary draft legislation to establish a War Crimes Court in Uganda—giving it jurisdiction over war crimes, mass murder, mass abductions, and etcetera.⁸ The existence of the Uganda War Crimes Court (UWCC) is derived from the Complementarity provision of the Rome Statute, Article 17.⁹ The Court's jurisdiction is drawn not only from the Rome Statute, but also from the Geneva Convention, Penal Code

stakeholder's_consultation_on_the_juba_peace_process.pdf (thanking the international community for their support of the peace process).

⁶ See Gov't of Southern Sudan, *Agreement on Accountability and Reconciliation, Juba Agenda Item No. 3*, BEYOND JUBA, §§ 6–8 (June 29, 2007), http://www.beyondjuba.org/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf (presenting the parties' agreement on Agenda Item No. 3 using formal justice processes, reconciliation and a focus on the victims as a means of restorative justice).

⁷ See Beyond Juba, *Report on the Proceedings of the JLOS Transitional Working Group Roundtable Discussion*, BEYOND JUBA, 7 (Feb. 5, 2009), http://www.beyondjuba.org/Coference_presentations/Report%20on%20The%20Proceedings%20of%20The%20JLOS%20Transitional%20Justice%20Working%20Group%20Round%20Table%20Discussion.pdf.

⁸ See *Uganda Project*, PUBLIC INTERNATIONAL LAW AND POLICY GROUP, <http://www.pilpg.org/uganda/> (last visited Nov. 17, 2010).

⁹ Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90.

Act, Trial on Indictments Act, Terrorism Act, and similar criminal statutes in Uganda.¹⁰ I have chosen to christen this phenomenon as the “Supplementarity doctrine”—picking and choosing one crime from one instrument to supplement other crime(s) from other instruments. This obviates such issues as the retroactivity of the crimes, given that the provisions of the Rome Statute, for instance, came into effect only from about 2002, while the LRA war in Uganda started back in 1986.¹¹ A most critical issue still outstanding, however, is the continued application of the Amnesty law in its present form—under which amnesty may be granted freely to any perpetrator who asks for it—thereby preempting possible prosecution of the perpetrator.¹²

The Court’s standards and procedures—including a trial bench of three Judges, Prosecution, Investigation, and Defence Office, and in-house translation service—all mirror those of the modern international criminal courts such as the Hague, Arusha, Bosnia, Yugoslavia, Sierra Leone, etcetera. In the legislation, we have sought to go even further by, for instance, providing the opportunity for an International Criminal Court observer at the hearings of cases by the UWCC—let alone the use of international legal experts to assist the Court’s proceedings.¹³

Another feature of the UWCC is the fact that it is a court for all war crimes and for all time.¹⁴ It is not limited to crimes arising from any particular conflict, such as the one with the LRA.¹⁵

II. TRADITIONAL JUSTICE

The UWCC is intended to deal with only the most serious cases arising especially out of the LRA conflict, namely those committed by the Commanders who gave the orders to the troops to commit those crimes.¹⁶

¹⁰ UGANDA LEGAL INFORMATION INSTITUTE, UGANDA: LAWS OF UGANDA, PENAL CODE ACT OF 1950 at Ch.120, available at http://www.ulii.org/ug/legis/consol_act/.

¹¹ Rome Statute Of The International Criminal Court, 1 July 2002, UN Doc. A/CONF.183/9; 37 ILM 1002 (1998); 2187 UNTS 90.

¹² See Jean-Rodolphe Fiechter, *The Role of Traditional Justice in Uganda, Given Rwanda’s Experience of Gacaca*, http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=jean_rodolphe_fiechter (last visited Nov. 17, 2010) (explaining that individuals who are responsible for the worst atrocities should be tried by formal courts in order to avoid escaping prosecution).

¹³ See *Uganda Project*, PUBLIC INTERNATIONAL LAW & POLICY GROUP, <http://www.pilpg.org/uganda/> (last visited Nov. 17, 2010) (explaining the Public International Law & Policy Group’s involvement in advising the Government of Uganda on a number of transitional justice issues).

¹⁴ Bill Oketch, *Uganda: First War Crimes Trial*, AFRICAFILES (July 21, 2010), <http://www.africafiles.org/article.asp?ID=24061>.

¹⁵ *Id.*

¹⁶ See Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternate Justice, and the International Criminal Court*, 50 VA. J. INT’L L. 107, 108 (2009) (“In 2005, the In-

We estimate such cases to number only between five and ten, in all.¹⁷ The great majority of the combatants in the bush would return, not to face the full wrath of the UWCC, but the mechanics of the traditional justice system—of which we have a “legion” countrywide.¹⁸ These range from the Mato Oput of the Acholi people to the Tolu Koka of the Madi population to the West, Aicul of the Iteso community to the East, Kayo Cuk of the people of Lango at the Centre, and Ohubakasa among the author’s own Samia people along the Northern Shores of Lake Victoria.¹⁹ However different though they are, they share some basic values and features. They are all restorative in objective, informal in nature, sincere admission, apology-and-forgiveness in content, all spiced with a measure of reparations, in content. These are age-old mechanisms, which have served their societies effectively, efficiently, and effectually. The wronged community, acting through their Elders and fortified by their rituals, engage the perpetrator who—if he passes the test of honesty, remorse, full disclosure, and open apology—is then embraced, reintegrated, and restored back into the community.²⁰ Remember that a substantial number of the “perpetrators” in the LRA conflict, are at the same time the “victims”—being child soldiers abducted at gunpoint and forced to stay at the war front on the pain of death.²¹ In this embrace, the community and the perpetrator, as well as perpetrator’s own family and clan, are healed of the trauma, are reconciled and restored, and can then start their new life refreshed and reformed. This is where justice meets healing, a critically fundamental feature of our traditional justice system.

A few questions still linger in the air, however. With modernity on the horizon, is there still the social glue in the land that will bind the system together, irrevocably? Do the Elders still wield the same influence and do they command the same authority they once did? Does the new, younger generation, bear true fidelity to the ways and mores of the ancient past? To

ternational Criminal Court (ICC or Court) issued arrest warrants for a handful of LRA leaders accused of crimes against humanity and other grave offenses.”).

¹⁷ *See id.* at 113 (“The ICC prosecutor duly initiated an investigation and, in July 2005, procured arrest warrants for Joseph Kony and four other LRA leaders.”).

¹⁸ *See id.* at 112–13 (“In addition to military efforts, the government passed legislation in early 2000 offering blanket amnesty to any LRA member who agreed to surrender and renounce involvement with the rebellion. . . . As of August 2008, at least 12,481 former LRA rebels had reportedly received amnesty under the Act.”).

¹⁹ *See generally* JUSTICE AND RECONCILIATION PROJECT, WORKSHOP REPORT OF THE WORKSHOP ON ACCOUNTABILITY AND RECONCILIATION IN UGANDA: JUBA PEACE TALKS (2008), available at http://www.humansecuritygateway.com/documents/LIGI_JRP_Uganda_workshopaccountabilityreconciliation.pdf (describing the various traditional justice mechanisms in place throughout the various peoples of Uganda).

²⁰ *Id.* at 11.

²¹ Barney Afako, “Reconciliation and justice: ‘Mato oput’ and the Amnesty Act”, CONCILIATION RESOURCES (2002), available at <http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php>.

what extent, if at all, should the multiplicity of these culturally specific mechanisms be standardized, without codifying the traditions? The Transitional Justice Working Group (TJWG) has researched these and other issues exhaustively and published reports at the intellectual, philosophical, sociological, and practical levels.²² The communities and especially the elders and the relatively young, all engaged in an in-depth study and discussion of these questions. The overwhelming sense has been that traditional justice has a critical role to play in the reconciliation of the population, and the healing of the wounds of this atrocious war. It is time to “bend the spears” of war, or as the Acholi would say: *gomo tong*.²³

For the legal fraternity of the African Region, the issue is deeply fundamental. We are on the threshold of a new jurisprudence—an amalgam of the formal and the informal, the punitive and the reformative justice working in happy tandem—a crossbreed between Africa and Europe—truly, a poignant point where justice meets peace and where justice embraces healing.

III. TRUTH-TELLING

Flowing from all the above, the Country is asking the question: What went wrong? Why is it that post-independent Uganda has known no peace at all for so long? What triggered the endemic gun politics of Uganda and its blood-soaked history? What have been the causes of the unrelenting turbulent waves of history and the unflinching violent winds of sociology that continue to buffet and toss the country, and how can we calm them? The answer from the Juba Peace Agreements has been a shrill shout for a “Great Gathering of the Nation,” to look with powerful binoculars into our distant past and to cut with a surgeon’s sharp scalpel into the social fabric of society to diagnose the cancerous causes of the endemic turmoil and tribulation embedded in our body politic.²⁴ In its third committee, the TJWG studied the issue—taking a comparative view of all the major models of truth telling mechanisms.²⁵ Among these were the Truth Telling Commissions of

²² See, e.g., UGANDAN BEYOND JUBA PROJECT ET AL., REPORT ON THE PROCEEDINGS OF THE JLOS TRANSITIONAL JUSTICE WORKING GROUP ROUNDTABLE DISCUSSION (2009) (detailing the Transitional Justice Working Group’s roundtable discussions in South Africa, which helped to determine what processes would be most suitable for implementing transitional justice in the Ugandan context).

²³ SVERKER FINNSTRÖM, LIVING WITH BAD SURROUNDINGS: WAR, HISTORY, AND EVERYDAY MOMENTS IN NORTHERN UGANDA, 225–226, (Duke University Press 2008); Barney Afako, *Traditional drink unites Ugandans*, BBC FOCUS ON AFRICA MAGAZINE (Sep. 29, 2006), available at <http://news.bbc.co.uk/2/hi/africa/5382816.stm>.

²⁴ See Agreement on Comprehensive Solutions, Uganda-Lord’s Resistance Army/Movement, May 2, 2007.

²⁵ See Beyond Juba: Building Consensus on Sustainable Peace in Uganda, Cape Town, S. Afr., Feb. 2–5, 2009, *Report on the Proceedings of the JLOS Transitional Justice Working*

South Africa, Liberia, Sierra Leone, and, most recently, Kenya.²⁶ All these models evidence a participatory forum, where perpetrators, victims, and witnesses are assured legal protection and well nigh immunity—or amnesty—from prosecution.²⁷ To this end, the records of the truth telling body are, in principle, inadmissible in courts of law—although the “leads” arising from such records may be allowed to be explored further and used in consequent criminal investigations.²⁸ Draft legislation for Uganda’s truth-telling effort is ready and just waiting for both Cabinet and Parliamentary debate.²⁹ A number of issues stand out for debate, including, in particular, the cutoff date, or baseline, from which the truth-telling exercises should begin.³⁰ This

Group Roundtable Discussion, at 4–8 (discussing the different sub-committees of the Transitional Justice Working Group and the justice mechanisms they are tasked with analyzing).

²⁶ See Amnesty Int’l, *Truth, Justice and Reparation: Establishing an Effective Truth Commission*, AI Index POL 30/009/2007 (June 11, 2007) (stating that many Truth Commissions have been created in the past ten years including those in South Africa, Liberia, and Sierra Leone); BBC News, *Kenya set to get Truth Commission*, BBC NEWS (Oct. 24, 2008, 4:18 PM), <http://news.bbc.co.uk/2/hi/7688505.stm> (stating that Kenya’s parliament had recently approved a Truth, Justice and Reconciliation Commission).

²⁷ See, e.g., Amnesty Int’l, *supra* note 26, at 24 (describing the amnesty offered in South Africa’s Commission); see also REPUBLIC OF LIBERIA, REPORT OF TRUTH AND RECONCILIATION COMMISSION 27 (2009), available at http://www.trcofliberia.org/reports/final/volume-one_layout-1.pdf (describing the amnesty offered in Liberia’s Commission); PAUL JAMES-ALLEN ET AL., TRUTH & RECONCILIATION COMMISSION AND SPECIAL COURT: A CITIZEN’S HANDBOOK 11 (2003), available at <http://www.ictj.org/images/content/0/9/094.pdf> (describing the amnesty offered in the Sierra Leone Commission); *Kenya Set to Get Truth Commission*, BBC NEWS (Oct. 24, 2008, 4:18 PM), <http://news.bbc.co.uk/2/hi/7688505.stm> (describing the planned Kenyan Commission).

²⁸ Office of the United Nations High Commissioner of Human Rights, Rule-of-Law Tools for Post-Conflict States, HR/PUB/06/1 (2006) (“To protect the rights of those persons who may be compelled to testify against themselves when served a subpoena, a commission may also need the power to grant use immunity, whereby individuals can be assured that information they provide will not be used against them in any criminal proceeding.”); Toni Phanner, *Cooperation Between Truth Commissions and The International Committee of the Red Cross*, 88 INT’L R. OF THE RED CROSS 363, 372 (2006) (“Nonetheless, as the South African amnesty for truth shows, some societies are prepared to forgo a retributive response to severe human rights violations in return for official acknowledgment of wrongdoing, an accurate historical record from which lessons may be learned in order to prevent future violence, public dialogue between different societal groups, and to give the victims and society the power to forgive, not merely provide evidence in a criminal case. For the perpetrators of serious crimes, participation in a truth commission can have a redemptive quality in a way that a criminal trial cannot.”).

²⁹ See, e.g., *National Reconciliation Bill 2009* (CORU working draft, 2009), <http://www.coalitionfortheicc.org/> (last visited Nov. 17, 2010) (search “National Reconciliation Bill 2009” in search box at the top right side of main page).

³⁰ See generally Agreement on Accountability and Reconciliation, Uganda-Lord’s Resistance Army/Movement Sudan, Jun. 17, 2007, available at http://northernuganda.usvpp.gov/uploads/images/u_h8S9SwfKutKGw70eM4vw/agendaitem3296.pdf (Section 2.2 states that the accountability processes may consider and analyze “relevant matter before this period, or the promotion of reconciliation with respect to events that occurred before this period.”). See

debate will be engaged at society's grass roots in all the regions and districts of the country, before moving to Parliament for final enactment.

IV. CONCLUSION

The ongoing experiment in Uganda deserves to succeed. It will bring peace and justice to a land deeply buffeted by war and rebellion. It will deliver justice and healing to a long-suffering people. In the process, it could breed a brand new jurisprudence that bonds together the best of contemporary Western punitive justice, to curb impunity, with the best of Africa's traditional restorative justice systems, to bind society's wounds.

generally Annexure to the Agreement on Accountability and Reconciliation, Uganda-Lord's Resistance Army/Movement Sudan, Feb. 19, 2008, *available at* http://www.iccnw.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf (Section 4 inquiry into the past and related matters looks at the principal agreement Sections 2.2 and 2.3). *See also* Michael Otim, *Challenges in the Pursuit of Transitional Justice: A Case of Northern Uganda*, LIU INST. FOR GLOBAL ISSUES (Apr. 16–18, 2007), http://www.ligi.ubc.ca/sites/liu/files/Publications/18Apr2007_MOtim_ChallengesPursuitTransitionalJustice.pdf (discussing the challenges of blanket amnesty).