



# War Crimes in Uganda: Seeking Peace through Accountability

## Event Transcript

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### Panelists:

- Rory Anderson, Africa Policy Advisor, World Vision
- Susana Sa'Couto, Executive Director, War Crimes Research Office, Washington College of Law
- David Scheffer, Professor, Georgetown Law School; former U.S. Ambassador-at-Large for War Crimes Issues

**Moderator: Maggie Gardner, International Law and Justice Program Manager, Citizens for Global Solutions**

*Note: This is an unofficial transcript. The opinions expressed are the personal opinions of the panelists and do not necessarily represent the positions of their organizations unless otherwise stated.*

## Rory Anderson, Africa Policy Advisor, World Vision

World Vision is an international federation operational in 95 countries; we're a Christian organization that provides on the ground humanitarian assistance, including 24 countries in sub-Saharan Africa. World Vision has been in Uganda since 1986, we have a presence in 23 of their [inaudible].

As a general background to this conflict, I would say that to the surprise of some lawmakers here in congress for the past 18 years, Uganda, our friends and ally in the war on terrorism and the example of the African economic miracle, has had a brutal and bloody civil war in the northern part of the country which has been waging for 18 years. The rebel group known as the Lords Resistance Army, also known as the LRA, has been fighting to overthrow the current government and president Yoweri Museveni.

Now what makes this war uniquely complex and perplexing are primarily two things. First the leader of the LRA, Joseph Kony, claims to be a spiritual leader who rarely espouses any sort of coherent political agenda, except that he wants to establish the Ten Commandments, and he routinely breaks the Ten Commandments. And second the LRA is made up of almost 90% children. These children we consider are hostages, these children were violently kidnapped and they were violently forced to serve as porters, sex slaves and soldiers for Kony's cause.

These two things make fighting the LRA both difficult and complex because first when you do fight them you are essentially killing children who are innocent and your hostages, and second trying to politically engage Joseph Kony, a leader who believes that he is, quoted, "a divine instrument of correction for Uganda and the Acholi people", also makes it very difficult to politically engage this man. Finally, what is perplexing about this entire thing is that in spite of all these strange facts this war has actually lasted for 18 years and it is getting worse, as evidence that we are actually sitting here today having this briefing.

Now the LRA, just a basic and brief humanitarian overview, the LRA are based in southern Sudan, a country north of Uganda, and the LRA has been used by the government of Sudan to fight against the rebels known as the SPLA, the prime rebels in fighting against the government of Sudan. The government of Sudan has been known and documented by several sources, including the government of Sudan themselves who have acknowledged, that they have given sanctuary and have armed and supplied the LRA. With this aid the LRA frequently conducts cross border attacks into Uganda, and for the past 18 years this conflict has primarily been contained in the northern districts of Gulu, Kitgum and Pader which is Acholi land, which is again [inaudible]. This is several miles north of the capitol Kampala. Nevertheless in the past few years the LRA has managed to push further south and closer to the capital, again forcibly abducting more children and displacing more people. Recently military operations were conducted in March 2002, as well as in March of this year, by the government of Uganda this military operation is known as Operation Iron Fist which basically is a protocol agreed to by the Ugandan government and the Sudanese government which allowed Uganda access into southern Sudan to basically wipeout the LRA in their home bases. This actually was like sticking the stick in the hornets nest; it actually has resulted in more humanitarian disasters. According to UNICEF and other agencies, more than 20,000 or 25,000 children, this is not an exact estimate these are rough estimates, 20,000-25,000 children have been abducted by the LRA and 10,000 alone have been abducted in the past year since Operation Iron Fist has begun, and more abducted daily. Again these children are abducted violently at gun point, are forced to commit unspeakable acts of terror, from hacking people to death, cutting off body parts, forcing victims to eat their own flesh, to the looting and burning of villages. And I'm not speaking as someone who has just read this, I have been to northern Uganda three times, two of which both in January and in March of this year and I'm in frequent contact with [inaudible].

As a policy the LRA attacks civilians and potentially targets children because they are more easily trained to be killers, sex slaves, and porter of heavy weapons and loot. As a result of this fighting over 1.5 million people, the WFP I think has given recent estimates of 1.55 million people, have been displaced, that is roughly 80% of the population in Acholi land, again 80% of the population are in displacement camps. And they're at their [inaudible] in these camps where they are hungry because they are unable to farm, through the war and inadequate food. They are sick because it's too insecure to provide health services and other humanitarian aid services. And they are very vulnerable because these camps are not adequately protected.

There is now a new and unique phenomenon of this conflict called the night commuters and this has become an incredible coping mechanism for many families in this conflict. Again I have probably been in almost every major war zone in Africa, except for Sudan, Congo, Liberia, Sierra Leone, Angola, you name it I've been there, we have programs there, this is the worst I have ever seen. This is the worst I have ever seen; I have never seen anything such as night commuters. Now let me tell you what the night commuters are, I'd love to hand out a Washington Post article with a very good story in February of this year, which can be passed out, I think it has been passed out. This is basically so that families can protect their children from being abducted. Some families send their children into town, their children walk as far as up to ten miles everyday, its not just a five day commute, it's a daily commute. They walk several miles to the nearest town, rain or shine, because there is greater military protection in those towns. Many of these children sleep out in the open, unprotected from the elements and primarily they are unprotected from predators who seek to abuse them. My last visit in March, we were talking to some of the children who are night commuters, over 40% of them have either been victims of sexual activity and sexual abuse or were aware of sexual activity. This is something that we need to be very concerned about. The UN estimates that in Gulu and Kitgum alone, about 25,000 children are night commuters, so as many or more as those who have been abducted. I would say that perhaps this is the lesser of two evils for some families but I think it's a choice that no one should ever have to make to send their child unprotected to avoid being abducted.

Despite all these grim statistics there are things that can be done. I would say three things are most pressing, that would be provision, protection, and peace. We need to provide, the U.S. government as well coordination with the International Criminal Court, needs to work to continue to provide for the international food needs as well as to do a better job of providing for the psycho-social needs of those who are traumatized as a result of this conflict. In speaking with resident USAID and UN officials about two thirds of the household needs are being met by WFP, WFP is doing an admirable job on the ground, they have been there for many who need to [inaudible] to monitor and coordinate and make sure that there is enough food and assistance provided. I would add that the psycho-social needs are really not being met. World Vision is one of two programs in Gulu servicing pretty much all of northern Uganda, there is a Concerned Parents Association that does work with traumatized children, but three organizations is not enough to cover the psycho-social needs of basically almost 100,000 children, if your adding up the night commuters, those who have been abducted, and all those who are effected by this conflict.

This morning I got an email from our manager of our children of war centre in Gulu, we have received in just this week alone 400 children who have come out of the bush, who have been rescued. We have currently 1000 children in our centre; this centre is set up to only care for about 200 children. So in some ways I would say it is exciting to see all these children being rescued basically out of a hostage situation but nevertheless donors are not really serious about funding this. Most of our programs are funded by private citizens, again we are a Christian organization so a lot of support comes from individual donors and churches. I think our aid needs to be outside the box a little more,

we have gotten some assistance from the US government but I think that donors and the USA could do more and be more creative with their aid. One of the reasons why I think they don't support these kinds of programs is its hard to document psycho-social progress on paper, but if we are very serious about our aid being effective and really meeting the needs on the ground, we have to get beyond paper and try and reach the hearts and minds of those who we are trying to help.

Finally let me mention two points about protection and peace. As aid increases, as we continue to try and deliver assistance, and increase assistance, whether its humanitarian assistance, through health or food and other means, attacks by the LRA will increase and this has been a prime frustration both in the humanitarian aid community as well as civilians on the ground. It is a duty of the government of Uganda, and any government, to protect its own citizens. That is part of what gives the government [inaudible] ... As a major financial and political backer of the government of Uganda the U.S. needs to continue to pressure the government to make protection a priority when fighting the LRA. And protection does not mean using informally trained and unequipped militia to protect a camp, which is what their current policy is. When I was in Gulu in January in private meetings with top Ugandan military officials, they acknowledged they simply did not have enough troops to do it all, they did not have enough troops to fight the LRA, provide adequate protection for [inaudible]. Their current policy simply is not working, you now have basically 80% of the population displaced and why you have basically 10,000 more children abducted. The U.S. and the donor community need to continue to pressure the government of Uganda to make protection a serious priority and change their policy because currently it's not working.

Finally, peace and humanitarian is probably the most fundamental important issue [inaudible]. I would say there have been various and several attempts by local religious leaders and traditional leaders to reach the LRA and I think for a variety of reasons the attempts have not been successful fundamentally I think the missing ingredient to peace is international leadership by the US and other main donors of the government of Uganda. 18 years of this conflict has shown that there is no military solution to this conflict but that peace is the priority. I would say that international pressure needs to be applied to the government of Uganda, first of all, to take the peace process seriously. Two, heavy and coordinated pressure needs to continue to be placed upon the government of Sudan, as they are the main armers and those who could [inaudible] the LRA. And finally we need some sort of mutual donor country, and that may not necessarily be the U.S. because they have designated the LRA as a terrorist organization, to really mobilize the international community and the UN to facilitate in the get a mutual process between the LRA and the government of Uganda.

Before I close I would like to make some comments since this panel is about war crimes and the international community and how judicial instruments can facilitate peace in this troubled region. I do not believe that the issues of accountability, and justice, and peace are incongruous – they need to be approached with wisdom. We as a community, the humanitarian aid community, whole heartedly condemn the atrocities of the LRA, unequivocally, and we very grateful and appreciative of the role of the ICC has played. The prosecutor has been very good at trying to engage the civil society organizations on the ground, I know he is very sensitive to the delicate and complex nature of this conflict but we are concerned about the potential that a pending case could pose on the ground. First the timing of these investigations, it is the opinion of many civil society organizations on the ground that while considering that there cannot be peace without justice, in this particular case we believe that justice would come at an expense of the sustaining of peace. It is credible that the investigations will have a negative effect on the peace negotiations and will further decrease the confidence that the LRA has with the government of Uganda. Civil society actors believe that the investigation at this stage in time is not so in the interest of justice and in particular those interests of the victims who are basically hostages by the LRA. An investigation by the ICC itself will not bring an end to the conflict and that is what the people are demanding. While this conflict is still active and

atrocities are still being committed, the government of Uganda has the responsibility to protect its own civilians, it should therefore explore other options to provide protection for the time being and may perhaps not avoid using the ICC or other international judicial instruments but perhaps wait until the time is more appropriate.

Again there are issues of complementarity with global judicial structures these would be the questions of whether the government of Uganda is incapable of prosecuting the LRA in its own courts. The national court system in Uganda is functioning right now it is therefore not clear as to why the government of Uganda would be unwilling to carry out the prosecution or trial within Uganda. This again raises the question are they trying politicize an international judicial instrument, whereas given a functioning court system it is standing it is operable and there are statutes that can be used to prosecute the LRA. Furthermore, in the north traditional courts as well as traditional reconciliation mechanisms, actually would warrant a different type of justice more of a restorative justice than an impunitive justice and those things we need to consider, which the ICC may not necessarily be able to cooperate. Finally there are issues of security and protection the ICC needs to pay sufficient attention to all aspects of security and the protection of those involved in this investigation. Particularly the children who are hostages as well as the NGO's they are, you know, basically [inaudible] our lives are at risk. As I outlined earlier the government of Uganda is not capable of providing an equipped protection for their civilians, you know that the [inaudible] for the LRA will be much more swift for those who are involved in the case against them.

Just to close this issue up [inaudible] had one of our child mothers in March, she noted that Kony is very aware of international presence. Kony has a cell phone, he has access to all the international media and he makes a point of studying it everyday. This particular young woman was sex slave for one of his commanders, so she was in the regular compound close to Kony, and she was in the LRA for 5 years and her [inaudible], is quite dramatic and interesting. In that she was telling me that Kony is aware and this whole possibility of ICC action really rattled his chain, it really got to him. I think this is interesting and insightful, I think that recent pressure towards the government of Sudan about dealing with Kony is also very interesting. I would argue that this whole veneer that Kony puts on about being a spiritual leader actually means that he is quite politically astute. All this pressure and the fact that he is paying attention to international movements means that he is very aware and very politically astute and so I would argue that it is not impossible to negotiate as he is very sensitive to these movements and reacts towards them.

Thank you for your time.

**Susana Sa' Couto, Executive Director, War Crimes Research Office, Washington College of Law**

Thank you for your very insightful remarks. I have been asked to speak about possible national and international options for prosecuting war crimes arising out of the conflict in Uganda. I would say that generally speaking the conflict in Uganda raises a complex set of issues of international criminal and humanitarian law. The ICC as we have heard, may well be one venue where crimes committed during this conflict can be addressed, there are however some other possibilities. Since 1999 the United Nations has been engaged in efforts to create a new type of tribunal for the prosecution of international crimes. These hybrid or internationalized courts contain a mix of national and international elements and pose a series of advantages and potentially some disadvantages that I will address in the course of my remarks. I have to say up front that although these tribunals are only one of a range of transitional justice options, which may include non-judicial options like truth commissions that we have seen in other parts of the world, my remarks will be limited to the discussion of the judicial options available to prosecute world crimes. And although I would agree

perhaps with Rory, that although a single initiative may not on its own be sufficient to bring about long term peace and stability, these tribunals can, I would argue, contribute to the restoration of peace and security by combating impunity for serious international crimes. I think what might be most helpful is for me to separate my remarks into two parts. One the options available for acts committed after July 2002, the date on which the ICC came into force and options available for crimes committed before July 2002, perhaps dating back to 1986 the beginning of this conflict in northern Uganda.

For the acts committed after 2002, of course the ICC remains one of the primary options. But, as David will no doubt discuss in further details, some hurdles remain. The ICC, as we have heard, is based on a system of complementarity, that means it complements, it doesn't replace national judicial systems. National courts get the first bite of the apple and as we have heard there is an open question as to whether the national courts have the capacity to prosecute war crimes. It is in fact only where they are unwilling or unable to investigate or prosecute crimes within the jurisdiction of the ICC that the ICC will step in or might step in. So one of the prosecutor's first tasks in determining whether there is a reasonable basis for conducting an investigation in Uganda, is to assess whether Uganda is unable or unwilling to address these crimes domestically. I am no expert on the Ugandan judicial system but I am told that there are great financial personnel, and maybe technical, constraints on the Ugandan judicial system and it may be one reason why the Ugandan judicial system may be unable to handle the complex cases of this nature without some outside help. It's definitely a potential. The other thing to keep in mind is that, is what exists under the national criminal code. I am told that forced abduction, or at least abduction for forced labor and slavery are crimes under the Ugandan national penal code but I am not clear, and I couldn't find a clear answer to this readily, I don't know whether the forced recruitment and use of child soldiers, a major issue in this conflict, is a crime under the national system. So this hurdle again needs to be overcome and the ICC may well be able to look into it for lack of capacity. But even if the prosecutor and the court agrees with this, any state with an interest in the matter has the right to challenge the investigation and the jurisdiction of the ICC over this case, and whether this will happen again remains to be seen. Finally although the referral by Uganda pertains only solely to crimes committed by the LRA the prosecutor could choose to initiate an investigation of crimes allegedly committed by the Ugandan government as well, this would however by statute require approval of a pre-trial chamber of the court. That's the ICC, that's all I'll say so that David can pick up on that later.

The other option that exists for prosecution of crimes after July 2002 is the creation of a hybrid and internationalized court of the kind I referred to earlier. Because these kinds of courts could have the power to try crimes both before and after July 2002, I'll discuss that option in more detail a bit later in my remarks. So again just to be clear, because the ICC has prospective jurisdiction only, meaning it can only hear case involving conduct that occurred after July 2002 it is not an option for prosecution of crimes committed between 1986 and July 2002. One option that does exist is the establishment of an international tribunal, such as the ad-hoc criminal tribunals in the former Yugoslavia and in Rwanda, known as the ICTY and ICTR. These tribunals were established by the UN Security Council under its chapter 7 on enforcement powers, which allows the Security Council to take actions necessary to restore or maintain international peace and security. The rationale for the creation of these tribunals that by assisting or by assigning individual criminal responsibility to perpetrators of atrocities during the conflict they would contribute to national reconciliation and help to restore and maintain peace and security.

Now although I think much has been accomplished by the ICTY and ICTR, these tribunals have also suffered from a number of challenges. Number one, both operate outside of the countries in which the atrocities took place. The ICTY sits in The Hague; the ICTR sits in Arusha, Tanzania. There were sound reasons for this at the time, security among them, but the distance between the tribunals and

the places where the atrocities have occurred has meant that the people on whose behalf these tribunals were ostensibly created have not necessarily felt connected to the trials being prosecuted there. In fact outreach efforts among the effected communities didn't take place until well after the courts were established and the result has been that the tribunals have suffered in terms of credibility among the effected public. Another problem has been that the operations of these courts has turned out to be extraordinarily expensive. They each have an annual budget of over \$200 million. I would say in part because of these challenged many in the international community have questioned whether these tribunals are really the way to address atrocities committed in other areas of the world. Many survivors of the violence that erupted in East Timor for instance after the 1999 independence vote requested a similar tribunal, an ad-hoc criminal tribunal, and the UN resisted creating such a mechanism there. I think for these and potentially some other reasons it seems unlikely that the UN will create a similar mechanism for the atrocities committed in northern Uganda.

So what other options exist for the prosecution of crimes between, were committed, between 1986 and 2002. Well a hybrid or internationalized court may be another option. In fact at least one of the other hybrid mechanisms that have emerged has jurisdiction over crimes that, as in the Ugandan case, that may have been committed decades ago the UN assisted tribunal aimed at bringing to justice senior members of the Khmer Rouge in Cambodia, is designed to try crimes committed between 1975 and 1979. So before I delve into how an internationalized court might apply in the context of Uganda it might be useful for me to describe what these type of courts look like. Internationalized or hybrid courts can generally be divided into two categories. One courts created on the basis of a treaty between a country and the UN or two hybrid models that have emerged from the context of UN missions. The special court of Sierra Leone is an example of a court created on the basis of a treaty. This special court has its own statute, its own rules and operates independently of the national courts of Sierra Leone. It has jurisdiction to hear international crimes, such as war crimes, crimes against humanity etc, but it also has jurisdiction to hear certain crimes under Sierra Leonean law. It is considered an internationalized or hybrid model because it is based on a treaty with the UN, it has judicial panels composed of both national and international staff, and jurisdiction to try both international and national crimes. The extraordinary chambers for the prosecution of Khmer Rouge crimes, is another example of a hybrid model although somewhat different it is also based on an agreement between Cambodia and the UN but that agreement really only sets up the framework for the court, its establishment and jurisdiction is actually based on Cambodian law. It is in essence a UN assisted extension of the Cambodian judicial system. Still, it is considered a hybrid because it will have jurisdiction to try both national and international crimes and it will be staffed by both national and international personnel, though unlike the Sierra Leone model the majority of its judges will be Cambodian, not international.

The other hybrids that have emerged have done so in the context of UN missions. The special panels for serious crimes in East Timor grew out of the mission in East Timor that was put in place there after the independence vote, the violence that erupted after the independence vote in 1999. Unlike the special court for Sierra Leone the special panels operate as part of the national court system of East Timor. However, again as with the other hybrids, they have certain international elements they have jurisdiction to try both national and international crimes, and are staffed by both national and international personnel. What does this mean? It means that Uganda could request assistance from the UN in setting up a similar court, perhaps on the basis of an agreement. And I think it is important to note that these hybrids have distinct advantages. They are certainly less expensive than the ad-hoc criminal tribunals, the estimated budget for the Cambodia court is between \$50-55 million for a period of 3 years, which is the expected period of operation for that court, a fraction of the annual cost of the ICTY and ICTR.

But more significantly perhaps is the fact that these tribunals sit in the countries where the atrocities took place, meaning that there is a far greater likelihood that the people there will know of its existence and be able to follow its proceedings which means that it may contribute toward the credibility of the tribunal and toward the process of national reconciliation. Having international participation from judges may also bring in much needed expertise and guard against the risk of bias that can arise in circumstances where local prosecutors and judges, where those judges might also have been victims of the atrocities. Lastly there is a possibility that these tribunals could have a broader impact on the judicial system if trials are conducted openly, fairly and credibly, the hybrid tribunals may become a model for other domestic criminal trials.

But with respect to Uganda, the application of the hybrid model also raises some challenges. Although the cost of a hybrid model is, like I said, far less than the cost of the ICTY or the ICTR, [inaudible] sufficient international support to fund another hybrid mechanism may be difficult. The special court for Sierra Leone, for instance, is funded through voluntary rather than UN assessed contributions and is already facing some financial problems relating to commitments made by donor governments that were made but not fulfilled. The second problem is even assuming sufficient funding there are a number of legal issues that may impose a problem for the prosecution of conduct that took place before 2002. Like the other hybrids, an internationalized tribunal for Uganda would have jurisdiction over serious international crimes as well as over certain domestic crimes. The problem is that these tribunals cannot prosecute conduct that was not considered a crime, either under domestic or international law, at the time it was committed. As we have heard from Rory, the alleged crimes that had been committed in northern Uganda include forced recruitment of children into armed forces perhaps murder, rape, sexual slavery, forced marriage, forced pregnancy and forced displacement of civilians and most of these acts have been prohibited under international law it is not completely clear that all of these acts were crimes under international law before July 2002. So for instance, although the forced recruitment of children under 15 is prohibited by the convention on the rights of the child the convention does not criminalize forced recruitment and although the optional protocol to this convention calls on all state parties to criminalize the conduct, the optional protocol did not come into force until February 2002.

Similarly although the Geneva conventions recognize children as a special class of civilians deserving special protection they do not address directly the issue of forced recruitment. The 1977 protocols go further than the Geneva conventions in that they prohibit the participation of children in hostilities, but they similarly do not explicitly criminalize the conduct. Some of the prohibitions in the Geneva conventions have been recognized as criminal under international law despite the fact that they are not written that way in the conventions, but with respect to the participation of children in hostilities for instance there is some debate. Forcing children to participate directly in hostilities has probably risen to the level of international crime. But this likely does not involve indirect participation in hostilities, such as gathering information, transporting weapons or supplies or providing sexual or other services for members of an armed group. So as the Ugandan example that shows it is these very tasks that are often entrusted to children, and as we have heard reports indicate that many of the children abducted by the LRA have been used not only as soldiers but also as porters, laborers and sexual slaves. This leaves us with the question of whether these crimes were prohibited under domestic law and as I have indicated I am not quite sure that they are, or were at the time, prohibited by domestic law.

There are a couple of other issues that I would raise but I will leave for question and answers so that David has some time to speak, but I just sum up by concluding that for the crimes after 2002 the ICC may well be a viable option. However if the aim is to prosecute crimes that have occurred both before and after the ICC came into force a hybrid or internationalized court may make the most sense. In addition to being close to home and thereby contributing in a very visible way to the

process of holding perpetrators accountable such a court may well have derivative benefits for the broader judicial system there. As I mentioned of the trials that are conducted openly, fairly and credibly, they may become a model for domestic criminal trials. This will of course be in large part dependent on the capacity and integrity of the international and national staff of the court and as we have seen with other hybrid models, ongoing training of all staff is critical to the success of these ventures. Lastly whether crimes are prosecuted by the ICC or a hybrid court, a key issue will be locating and arresting those most responsible for the atrocities committed in Uganda and it will require the active cooperation and support not only from the Ugandan government but also from neighboring states and international institutions and again whether this will happen remains to be seen. Thank you.

## **David Scheffer, Professor, Georgetown Law School; former U.S. Ambassador-at-Large for War Crimes Issues**

Well, we have had two very excellent presentations by Rory and Suzanna. First I want to thank Citizens for Global Solutions for pulling this together, they are on many different advocacy fronts these days, they [inaudible], including one of my old favorites Law of the Sea Treaty, which I know you have been knocking on doors here for. I also know there are a lot of familiar faces here. One, Alex, can I publicly recognize you? Yes, Alex is a student at Georgetown law, raise your hand Alex, and Alex Little is about to fly off to the Hague to work directly with Christine Chung who is going to be the, I guess the deputy prosecutor of sorts, working directly with Prosecutor Ocampo with the primary responsibility of the Lords Resistance Army investigation. So Alex is about to venture off into exactly what we are talking about, so good luck Alex.

I have a few points to raise regarding the strictly ICC issues so with respect to this I think some of the points that have been raised are right on the mark and I think in particular a lot of the concerns that Rory raised are ones that the prosecutor is clearly going to have to factor in. Remember that he always has the discretion written into the statute to make decisions in the interest of justice, he can determine himself what those interests are so he has a lot of flexibility to take into account the many factors that Rory has raised here as he tries to, in a very sophisticated way, address the issue and see where he can, and should, follow through with the state referral by Uganda on this matter. Recall that Uganda became a state party to the ICC treaty before its temporal jurisdiction even came into effect in July 2002, so it was one of the original 60 state parties to the statute and therefore it is very correct that the temporal jurisdiction with respect to the courts jurisdiction of this matter it would be best to start with crimes as of and after July 1<sup>st</sup> 2002.

It is also important that we recognize that even, I found it very interesting, even in the initial statements made by prosecutor Ocampo regarding the state referral and his interest in looking at the situation in Uganda that after the state referral was made, about two months afterwards, there were considerable news coming out of the Barlonyo camp massacre in Uganda in February, and he said at that time that he will shortly announce the initiation of an investigation, that announcement has not yet been made with respect to Uganda. A state can refer a matter to the court, that doesn't mean that the prosecutor has to run with it, other than to review it, determine whether or not there is a basis for seeking an investigation and then proceeding with that investigation if he so determines that there is merit to do so. So the simple fact that Uganda referred this does not automatically obligate any formal investigation and certainly no prosecution if the prosecutor decides otherwise. Nonetheless, he did say in response to the massacres in February, that were attributed in most reports to the Lords Resistance Army, that he will only prosecute those bearing the greatest responsibility for crimes committed after July 2002. That is a very interesting phrase that he used, greatest responsibility, that is the statutory phrase in the special court for Sierra Leone which we

negotiated for weeks and weeks with the specific intent of constraining that court's, for many different reasons, investigative efforts to truly a small number of perpetrators in the Sierra Leone conflict.

He, the Prosecutor, not only in this statement but in many other statements made over the last year, clearly is moving very aggressively towards a high end, small number category of suspects in the situations that he is looking at in various parts, particularly of Africa, he's not intending to take on a large investigative effort over a large number of individuals. He understands what his limitations are, his resources, his capacities, and I thought it was very interesting that he used that phrase very explicitly, "those with the greatest responsibility", it sort of gives you a heads up that obviously Kony and others are within that framework of greatest responsibility, but it also means that I think we should put our minds at ease, those particularly in Rory's, from Rory's perspective on all of this, who are so deeply concerned about how far would the Prosecutor actually go, how disruptive would this be of other efforts on the ground. I gather from this that Mr. Ocampo is clearly intending to maintain a sharp focus in this investigation and to look at what probably would be a fairly small number of individuals implicated at the very highest level in these crimes. And of course Suzanna has said that he has every possibility of broadening his investigation to include Ugandan army actions in the field and he will simply have to go to the pre-trial chamber and get a sign off on that and I can't imagine the judges out of sheer matter of integrity denying him that opportunity to broaden the investigation to include Ugandan army factors.

So, I think all of that is ahead of us but I think it is important simply to emphasize the Prosecutor already is making some very focused decisions about how he wants to proceed and he has certainly brought a, by all reputation, a real professional into the operations to do the day by day work, Miss Chung from New York, a 39 year old New York prosecutor who is over there now working away at this matter. It is also important however to note that the formal investigation has not yet commenced, he is reviewing information and then he will announce at some point whether or not he will launch a formal investigation so that we have to await an announcement for and we will get much more guidance in light of that announcement. Once he makes an announcement, lets assume that he makes an announcement that he will go forward now with a formal investigation of the Lords Resistance Army and perhaps more, who knows, it is at that moment that article 18 of the ICC statute kicks in. This is one that we and the United States government negotiated into the Treaty successfully and this means that he will have to notify all state parties to the ICC as well as all non-parties that may have some jurisdictional nexus, or some jurisdictional interest in this matter, to the fact that he in fact is launching an investigation, they then have a timeline, these states, to step in and notify him that they themselves are launching investigations into individuals over whom they have jurisdiction and who may have some relationship to this particular situation. And there is a whole procedure set forth in article 18 for that complementarity principle to kick in, it is theoretically possible, although unlikely since they referred the case, that Uganda would step in and make some announcement, in fact it might announce that a certain category of cases will itself be dealt with in Ugandan courts so please stay away from that and the court will have to back off. The other interesting player here of course is Sudan. Now I wouldn't be surprised at all if Sudan steps forward and says don't touch anything that relates to any individual that's connected with Sudan here. The court will have to analyze that very, very carefully because they will have to determine, and the Prosecutor may trigger their determination, as to whether or not over a specific period of time Sudan's representations represent an able and willing capacity on the part of Sudan to actually take this up or whether in fact Sudan is unable or unwilling politically, to do the job that it represents it is going to do. So we will have to see how that plays out on Sudan's part but I have no doubt that if he gets into this investigation that Sudanese officials will inevitably come onto the radar screen for some examination with respect to their role in all of this, keeping in mind that he is going to stay within that "greatest level of responsibility" category.

Now a couple of other points. For those of you here on The Hill it is important to remember that the American Servicemen's Protection Act 2002 will probably have relevance to all of this. Some of you are probably veterans of that piece of legislation; you should bear in mind that section 2004 of the legislation, prohibition and cooperation of the International Criminal Court, clearly is relevant here. On its face the United States would not be able to cooperate with the ICC in any matter whatsoever, provide witnesses, documentation, sharing classified intelligence, whatever, State Department consultations or discussions with the court, all of that is prohibited. And in fact you can't even send ICC investigators onto U.S. soil to talk to anybody under this act. So, it is fairly draconian and of course there is a waiver, and my hope is that the President will see the wisdom, if this thing is actually launched as an investigation, of permitting a waiver as the acts determines it has to be with respect to individual suspects, it can't just be a broad waiver of cooperation with the court for an investigation of a situation, it has to be with respect to names and individuals, but once the prosecutor steps forward with a named individual as a suspect, confidentially perhaps to the United States government, I would hope that the President would see the wisdom of a serious consideration of a waiver of ASP so the United States can play a constructive role in moving this process forward in the ICC.

And then finally there are often questions raised here about the child soldier issue, Rory made a very good point that we are talking about an armed force 90% children. Two things on that, first the ICC statute will not permit prosecution of any individual under the age of eighteen at the time the crime was committed. And therefore that is just not going to be possible; children will just not be prosecuted by the ICC. But I think it also fits in nicely to the greatest responsibility theory that it is very doubtful that any of those children in the end could be seen as the major planners, plotters, conspirators, of the kind of activity that the Lords Resistance Army actually initiates, that the chain of command goes to individuals somewhat older than eighteen, that's just my guess. In Sierra Leone we had this problem with child soldiers and the Sierra Leone statute was modified to accommodate fifteen to eighteen year old prosecutions and yet we did that in part because of the request of the Sierra Leone government because so many of these teenagers were in fact the ring leaders of the mutilations and yet the prosecutor of the Sierra Leone court made a determination some time ago that he is simply not going to go after them, he is going to after other people much older. So the Prosecutor has that discretion and in this case the discretion is cut off by the statute itself, it will have to be individuals eighteen or older. I think I will stop with that and invite questions, thank you.

## **Maggie Gardner, International Law and Justice Program Manager, Citizens for Global Solutions**

We are almost out of time so we might be able to take one or two questions. I do briefly, quickly want to say a couple of things to wrap up the great presentations made by our panelists this afternoon. To build a little bit more off of what David was speaking about at the end, I also want to point out that the office of the Prosecutor at the court has set a policy already that one aspect that he is taking into account before launching any formal investigation is whether the security of victims and witnesses or anyone the court comes into contact with can be assured, that if security cannot be provided on the ground that that could be a reason to not even launch a formal investigation. And also I wanted to ask you, that my understanding was that with a referral, even from a state party, that the Prosecutor gets to determine what the situation is so even if President Museveni referred the situation regarding the Lord Resistance Army, that the Prosecutor can consider the actions of the Ugandan army in responding to that threat as well without needing a separate...

**Scheffer:** Well no, I think what would have to happen, because otherwise the Prosecutor theoretically could expand a state referral beyond all balance, I think what would happen is the Prosecutor would take a look at the state referral and then if he wanted to extend it beyond the precise language of the state referral he would go to the pre-trial chamber and say I need your sign off that I am going to expand this under my article 15 power to include some other aspects of this situation.

**Gardner:** Ok, thank you David. And I also want to emphasize Rory's closing point which is that the U.S. does have a role to play in helping resolve this crisis in Uganda and 48% of Uganda's budget is provided by donor countries and the U.S. is one of the largest donors to Uganda, so that is definitely something to keep in mind. Finally, like David said, the formal investigation has not been announced yet. We expect in the coming months and probably fairly soon, for the Prosecutor to announce formal investigations, or that he won't be doing formal investigations, in Uganda and also in the Democratic Republic of the Congo, which is another state party which has referred the conflict in Ituri to the court as well. And in preparation for that Citizens for Global Solutions will be producing a report in the next couple of weeks about the ICC's potential role in Uganda and the Democratic Republic of the Congo taking up a lot of these concerns and a lot of these expectations and we are looking at how that might play out.

### **Question and Answer Session**

**Q.** I'd like to know just to cut to the chase, is it possible for the government of Uganda to avoid prosecution of UPDF personnel as the ICC statute currently exists?

**A. Scheffer:** Yes it could, even if the Prosecutor says I want to expand my investigation to the government forces themselves, at that point the ball is in the governments hands, they can say that is very interesting thank you, we were in fact anticipating that you would reach that decision and we have now an investigative and prosecution strategy that we will play out in our courts, under the complementarity principle, so that relevant individuals in the armed forces will in fact be properly investigated. Depending on the integrity of that representation and then the action taken upon that representation, the ICC maybe forced to back off with respect to those particular prosecutions. But if the ICC grows suspect as to the good faith of the Ugandan government or its ability or willingness to do it then the Prosecutor can go back to the pre-trial chamber and say after a certain period of time the Ugandan government has not followed through and therefore I am now going to consider putting forward an indictment to, that will have to be addressed by the court. So it depends on the good faith

performance of the Ugandan government as to whether it can slip out of that net of a potential prosecution of its own armed forces by the court.

**Q.** But does that mean that it can cut off any investigation of abuses?

**A. Scheffer:** Well actually yes, in the sense that under article 18 the theory is the court does not proceed with investigations if the domestic jurisdiction in fact is undertaking them. There is a little escape clause in article 18 that says the Prosecutor, depending on the circumstances, can take steps to preserve evidence and make sure the evidence is not destroyed in the event that there is a determination that the domestic court system is either unable or unwilling ultimately to take to the job on. So there is a statutory right to take steps to preserve evidence, now how he actually does that is totally problematic depending on the circumstances of what he can do to preserve the evidence.

**Sa'Couto:** There is also the possibility of periodic review.

**Scheffer:** Well yes, under article 18 there is a whole procedure for review of whether or not the domestic courts are doing their job that they are represented to be doing and then if they are not then he can always step forward to the pre-trial chamber and say the game is up.

**Q.** I want to ask Rory how reassured you are by the presentations that followed yours, and also I wonder if you can tell us how widespread in the human rights community in Uganda the view is that the ICC investigation could be disruptive, are there different viewpoints or [inaudible]

**A. Anderson:** I guess I will try and answer and answer your question. To take the second part of your question, I don't know if this sign on letter was passed out to you, I can certainly make sure you get a copy of that, but basically the points that I had highlighted were from a letter of a group of civil society organizations on the ground, not necessarily representing the human rights community but certainly active civil society and humanitarian aid organizations on the ground in Uganda and it is a pretty broad swath of locals as well as international. Again there is concern, people are appreciative of the role but there are certainly concerns of the timing, I think that's the sort of considerations I have outlined there. So that I think it represents a certain swath of the community in Uganda as well as some who are concerned here as well.

[Tape Change]

**Anderson:** ....it really creates a lot of concern and consternation and when I wasn't even aware of that there actually has not been a formal investigation, the way it has been emitted out of the media that it was effective complete and that this is a done deal and it is going forward and that they were actually beginning an investigation so there is a lot of misinformation about the ICC so I am allayed at having a better understanding of some of the statutes and what can and cant be done, that is also very helpful.

**Scheffer:** And what is so important about the start of an investigation is that is the moment when the Prosecutor actually sits down and says, alright who do I need to request specific cooperation from, from governments, organizations, etc., in order to now proceed as opposed to just reviewing [inaudible]

**Q.** I am wondering how they see this investigative process of the International Criminal Court, building on the peace process?

**A. Sa'Couto:** Again when I gave my remarks, my remarks were limited to judicial options. In other areas of the world we have seen a complementary relationship between a judicial process and a non-judicial process, like the truth commission. Sierra Leone is a good example, there is a report and ... a truth and reconciliation committee, which is the very beginning, created some tension or some doubt over how they would work together, as it turns out I think there have been a few glitches but they work together well in the documenting of lots of the atrocities that happened at the lower levels by the TRC, but a concentration of those who have the greatest responsibility for the atrocities committed there, by the court. So I don't think there is any one solution, I think a combination of solutions might have to be used to address long term ...

**Q.** [inaudible].

**A. Sa'Couto:** Well I think fortunately that lesson has been learned to some extent I don't know how well it is going to be implemented but for instance when looking at the establishment of the extraordinary chamber in Cambodia many people have been concerned, both national NGO's as well as international NGO's, have been concerned with outreach in advance of the establishment of the tribunal to the effected population and to not only about ....mandate of the court but its strengths, its scope, its jurisdiction, etc., so hopefully we have learnt that lesson in other contexts and will do a lot more in so far as the funding of the court, much of that is not envisioned in the budget for the extraordinary chamber, so it requires extra support form the national, international communities to make that happen.

**Anderson:** And one last thing to add to that too is that the ICC does have the option of locating trials in the country concerned, that's the decision that will clearly be made later with regard to specific cases.

**Q.** Matt Sonneyson, I work for Senator Alexander who chairs the Africa Sub-Committee. I am a little surprised by the emphasis on a judicial solution to what is going on in Uganda since we don't have a peace process there s far as I can observe, we have a war. How realistic is any judicial process given that the Ugandan government clearly views the LRA as n enemy combatant that they are going to pursue to the very end and there doesn't seem to be a great deal of interest in having some kind of peace process going on there?

**A. Gardner:** I will introduce this for Rory, I will say that that's definitely a debate that is on going and there might not be a great perfect answer but I will let Rory attempt one.

Rory: That's a great question Matt, thank you. I mean I think that again was part of our frustration, again prefacing my remarks we are very appreciative that there is an international concern about this issue and that accountability has reached, of the crimes committed against these children, has reached to the highest levels of the international community and that is an encouragement to us. Nevertheless, our frustration is the timing of this, as again as you correctly pointed out Matt, the war is continuing. There have been several attempts at a peace process and I think for a variety of reasons they have failed but I think that peace needs to be the priority or finishing up the war, something, you need to have real closure to this so the timing is an important question but the debate will continue. As I mentioned, Kony is not ignorant of these things and these things rattle his chain, they do have an effect on how this war is prosecuted so you can't remove that. But I think that our priority, I'm speaking of that of World Vision and a number of humanitarian aid organizations on the ground, that our priority is actually to push forward with a peace process and then call for international judicial action.

**Scheffer:** I do think that we have to keep in mind that the precedence of the last ten years...particularly in the Balkans, we had a judicial process going forward right in the middle of a

conflict and ultimately I think there was some considerable benefits to that, there would have been even greater benefits if they had apprehended two of the top individual who were still at large. I don't know if it plausible anymore, quite frankly, to consider a negotiated settlement in which you vest impunity on some of the larger suspects for atrocities. I know we have a long history of that and I can remember the government in the nineties not thinking too much about, with respect to Haiti .... But I think we have come a long way since 1994 and I don't know if it is plausible to continue, going into the 18 year of a 17 year problem in Uganda, and create a road map which may at the end offer to the very main suspects in these crimes the prospect of impunity. I think they have to know that there is some accountability. I think also the system has grown, in the last ten years, very much to recognize much greater flexibility on mid and lower range perpetrators whereby we are funneling them into truth and reconciliation processes, rehabilitation camps and not imposing draconian judicial remedies on those individuals. But when it comes to the very highest leadership, I am not convinced that continued negotiations with the assumption that there will be impunity or no judicial action, if that works when the conflict has continued for as long as it has, it is sort of like proving a negative, which I am always asked to prove, you know prove that these courts are a deterrent to these crimes, then you have to start thinking how do I prove that negative? But I think it also accounted upon those who seek a free ride, the top perpetrators, to prove that in fact they will do precisely what you want them to do quickly in a peace negotiation.