In December 2003 President Yoweri Museveni of Uganda asked the prosecutor of the International Criminal Court (ICC) to investigate ‘the situation concerning the Lord’s Resistance Army’. The LRA have been waging war in the north of the country since the mid-1980s. Most of those caught up in the conflict have been from the Acholi population of Gulu, Kitgum and Pader districts, but neighbouring areas of Lira, Apac, Adjumani, Kumi and Soroti districts, where the people are predominantly Langi, Madi and Teso, have also been affected. Abductions, including the kidnapping of children, have been common, and hundreds of people had been compelled to kill and maim or be killed and maimed themselves. Victims have had lips, hands and fingers cut off. Some have been forced to slaughter their own parents, or drink the blood of those they have murdered. Several massacres of civilians have occurred, and hundreds of thousands of people are living in displacement camps, where conditions are often appalling. The scale of suffering is immense, and there is no doubt that crimes have been perpetrated that fall within the jurisdiction of the court.

The ICC is a new institution, and the legal process in northern Uganda was to be its first big case. The decision to establish it had been taken in July 1998, when 121 of the 148 states represented at a conference in Rome agreed to accept the text of the proposed statute. The vote followed five weeks of intense and sometimes acrimonious discussion, and many years of lobbying by humanitarian agencies and human rights activists.

Inevitably, the statute is full of compromises and several parts of it show signs of haste. The awkward mixed metaphor at the
One start of the preamble is just one of many examples. It tells us that ‘all peoples are united by common bonds, their cultures pieced together in a shared heritage’, and expresses concern that ‘this delicate mosaic may be shattered at any time’. But other parts of the document move beyond empty rhetoric, and make clear and unequivocal statements. In so doing they assert a commitment to invigorate international law and move it in a new direction. States signing the Rome Treaty affirmed ‘that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation’. They were determined ‘to put an end to impunity for the perpetrators of those crimes’, and were resolved ‘to guarantee lasting respect for the enforcement of international justice’. Much to the surprise of sceptics, who thought this was just one more example of end-of-millennium wishful thinking, the sixty ratifications of the Rome Treaty that were needed to bring the statute into force were accumulated within four years. As a consequence the jurisdiction of the ICC came into effect on 1 July 2002.

Quite what this means in practice is yet to be established. The implications of setting up the court may be far reaching, or its role may be circumscribed by US antipathy and the reluctance of those states that have ratified the Rome Statute (i.e. ‘State Parties’) to act effectively on its behalf. Perhaps not surprisingly, the waters are being tested in parts of the world that are politically and economically of limited significance for the major powers. All the ICC’s ongoing investigations are in central Africa. The referral by the government of Uganda was followed by state party referrals from the governments of the Democratic Republic of the Congo in April 2004 and the Central African Republic in January 2005. Then, in March 2005, alleged crimes committed in the Darfur region of Sudan were referred by the UN Security
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Council. This new case is hugely significant for the ICC, but at the time of writing in mid-2005 the investigation and preparation of warrants are at a relatively early stage. Up to now, the Ugandan case has been the most important, and also the most controversial.

That atrocities have happened in northern Uganda is well established, even if the war between the Ugandan government and the LRA has rarely been covered in the international media. Indeed, the United Nations Children’s Fund (UNICEF) had suggested that events in Uganda would be an ideal case for the ICC back in 1998. In the months immediately after the referral, further gruesome killings occurred, including one of the worst individual incidents of the war when some two hundred unarmed people were massacred at Barlonya camp on 21 February 2004.\(^5\) Photographs taken the morning after another incident at Pagak in May show the bodies of women and children. They are lying,
quite neatly, in the grass next to each other where they were killed. Each has its skull smashed, including the babies, who are still wrapped in their shawls on their mothers’ backs.

Expectations that such events would lead to relatively straightforward prosecutions and convictions were, however, soon found to be misplaced. The complexities on the ground clearly took the ICC by surprise. It has found itself on a steep learning curve, dealing with intense local as well as international opposition. Fundamental issues have been raised about what justice means in an African war zone and about how political order can be established. Among other things, a commitment to ending impunity sets limits to what can be offered in peace agreements. In August 2005, a year after the Office of the Prosecutor began formal investigations, warrants have been prepared but not publicly issued (NB: it subsequently became known that sealed warrants had been issued in July 2005 – see Postscript). The court has had to bide its time, waiting for the right moment – and for key donors to give the go-ahead for it to act. Nevertheless, the capacities and status of the ICC have been rising. It has become a key factor in the ongoing negotiations, and has positioned itself to have a pivotal role both here and north of the border in Sudan.

This book is about what happened when international criminal justice was introduced to northern Uganda. It interrogates myths and misunderstandings, and explains why the ICC intervention has not proceeded as initially planned. It also shows why recent developments in Uganda may have far-reaching effects. But first, it is necessary to provide some background information about developments in international criminal justice.

International law and the most serious crimes

For some political analysts, international law does not really exist. The term is commonly used to refer to a body of rules laid out in agreements between states. These rules have a rhetorical
significance in diplomacy, but they are not impartially applied and may at times be ignored by a government if they are not considered to be in the ‘national interest’. The rules suggest that states are bound to behave in appropriate ways, but where is the mechanism for ensuring that this happens? Responses to the absence of sanctions have involved trying to hold the governments of states to account by making it apparent that it is in their interests to regulate their own actions and to make them feel uncomfortable if they do not. There are in fact a large number of regulations that are widely observed, at least partly because they are essential for the economies of the richest and most powerful states, which collectively exert pressure on weaker states to comply. Such regulations make, for example, international investments, trade and air travel possible. But in other areas, persuasion has been less effective. For example, controls on environmental degradation have been resisted and all kinds of human rights have been set aside at will. With respect to the latter, Amnesty International has persistently drawn the attention of governments to failures in their apparent obligations under conventions their states have signed and ratified. It can have an effect in some circumstances, but the worst offenders generally do not care much about what Amnesty International or any other well-meaning group has to say.

The possibility that international law might offer more than a set of ‘best practice’ codes of conduct for governments, and also the reality that it often does not, is closely connected with agreements reached at the end of the Second World War. Still shaken by events, including the recent liberation of the Nazi death camps, the founders of the UN system had wanted to ensure that such things could not happen again. According to its charter, the ‘Peoples of the United Nations’ were determined ‘to save succeeding generations from the scourge of war’, ‘to reaffirm faith in fundamental human rights’ and ‘to establish
conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained’. In a series of articles grouped in Chapter VII of the charter, the Security Council was mandated with the task of taking action ‘with respect to threats to the peace, breaches of the peace, and acts of aggression’. Security Council resolutions were intended to be binding on all UN member states, and the council was given powers under Article 42 to take military action ‘to maintain or restore international peace and security’.

At first it seemed that this new approach to international law, and particularly criminal justice, might have a chance of being made effective. A series of agreements outlined a radical clarification and extension of criminal accountability. In most respects, the Nuremberg Charter of August 1945 built on long-standing procedures for prosecuting captured enemies, but it made two very significant departures. Article 6 referred to ‘crimes against humanity’ to describe ‘persecution, enslavement, deportation and other inhumane acts’ committed on a very large scale, and Article 7 rejected immunity, stating that ‘the official position of defendants ... shall not be considered as freeing them from responsibility or mitigating punishment’. The proceedings that followed were not without their flaws. Systematic rape, for example, was ignored in the indictments, perhaps because it would have been difficult not to implicate the Soviet army. But the atrocious acts of those Nazi leaders found guilty were laid out in detail, their culpability established beyond question, and a model established for holding those most responsible for the worst crimes to account. Three years later, in 1948, came the Universal Declaration of Human Rights. It had no enforcement mechanisms and was not a statement of law, but it spelt out very clearly what an obligation to promote human rights means. It was also submitted for signature the day after the Convention on the Prevention and Punishment of the Crime of Genocide.
This did require states to prosecute and punish, either through domestic judicial procedures or ‘by such international criminal tribunal as may have jurisdiction’.

These developments, together with the 1949 Geneva Conventions, promised a great deal, but there remained a crucial flaw. In the past there had been few international arrangements that sought to restrict the choices made by the governments of independent states, and concerns about possible infringements of sovereignty were reflected in Article 2 of the UN Charter. This precluded intervention ‘in matters which are essentially within the domestic jurisdiction of the State’. Other articles of the charter reiterated the point, and respect for national sovereignty became a predominant aspect of post-Second World War international relations. To give just one important example, the International Court of Justice (ICJ) at The Hague was mandated to deal with any question of international law, but states have to refer cases themselves, and are free to choose not to do so (or even present a defence if they have opted out of that requirement).

The tension between international obligations and national sovereignty had been recognized in the UN Charter. Chapter VII was intended to deal with it in the more extreme cases. It quickly became apparent, however, that Chapter VII was inadequate. Permanent members of the Security Council could veto resolutions, and once divisions opened up between them, any agreement over enforcement measures became unlikely or impossible. By the time the Universal Declaration of Human Rights was signed, the cold war had begun in earnest. The Soviet ambassador to the UN dismissed it as ‘just a collection of pious phrases’.

For the next forty years the superpowers themselves and their main allies repeatedly failed to comply with the post-Second World War agreements, and signed various others without any serious intention of being bound by them. Appalling governments were supported and protected as long as they kept to the correct ideological
One line. The list of puppet monsters that enjoyed impunity seems endless. Leaders like Kim Il Sung, Pol Pot, Mengistu, Pinochet, Mobutu and Barre acted without any expectation that they would ever be prosecuted for their barbaric behaviour.

The incapacity of the Security Council also meant that governments of newly independent countries could do just about anything they liked to domestic opponents under the guise of anti-colonialism. Non-interference and protection of borders inherited at independence became an obsession of the Organization of African Unity (OAU). Even the Tanzanian invasion of Uganda in 1971 to overthrow the dreadful regime of Idi Amin received no official support and was condemned as a breach of international law. Amin himself was allowed to live out his days in relative comfort in Saudi Arabia.

There were a few exceptions and glimmers of hope. The introduction of sanctions against apartheid South Africa by the UN in 1967, and their extension in 1977 as mandatory under Chapter VII of the UN Charter, indicated what could be done if there was enough political will. Also the founding of Amnesty International in 1961, as well as the emergence of other non-governmental organizations and human rights groups, revealed that the conventional dispensations of international diplomacy and power politics were not accepted by everyone, and might be resisted and opposed with a degree of success in some circumstances. Eventually the pressure on the US government over its activities in Vietnam proved overwhelming. But overall the human rights record was bleak and the idea of holding to account those individuals who committed crimes against humanity was manifestly a failure. It was not until the late 1980s that there was much prospect of this changing, when the ending of the cold war made it conceivable that the Security Council would take on the role that had initially been intended for it.

In the event, the 1990s did not witness the promised ‘New
World Order’. On the contrary, it was a decade of humanitarian and human rights disasters, including the disintegration of Yugoslavia, the US-led intervention in Somalia, the genocide in Rwanda, the fall of Srebrenica, new wars in Liberia and Sierra Leone, ongoing wars in Sudan and Angola, and the disappearance of hundreds of thousands of people in Congo who were supposed to be under the protection of the Office of the United Nations High Commissioner for Refugees (UNHCR). Initially, the Security Council, led by the USA, took a highly interventionist approach, but by mid-decade confidence in militarized humanitarianism had waned. In 1994, at the insistence of the UK and the USA, the Security Council refused to accept that genocide was occurring in Rwanda, precisely because it would have meant that the 1948 Genocide Convention would apply and enforcement procedures be activated.

While ending the cold war did not lead to an era of peace and tranquillity, however, it did have the desirable effect of reducing incentives to cover up atrocities and keep mass murderers in power for strategic purposes. At the same time, the introduction of new techniques in television news coverage, such as ‘real time’ reporting and twenty-four-hour channels, combined with the publicity campaigns of human rights groups, fed demands among electorates in rich countries for something to be done. In this context, the Security Council decided to return to the precedent of Nuremberg and the notion of international criminal prosecution. Initially this was done in a distinctly half-hearted way, but it opened the door to some remarkable developments, including the creation of the ICC.

_A resurgence of international criminal trials_

In 1993 the Security Council set up the Hague Tribunal for War Crimes in Former Yugoslavia, otherwise known as the International Criminal Tribunal for the Former Yugoslavia (ICTY). It
did so by invoking Chapter VII of the UN Charter. Apparently the council had the power to hold perpetrators of the worst war crimes against humanity to justice after all. Indeed, an implication of Resolutions 808 and 827 is that the Security Council had always had an obligation to do so under its powers to keep the peace. Having done this for Yugoslavia, no case could be made for it not being done for Rwanda as well. The result was an appendage of the Hague Tribunal established in November 1994, known as the International Criminal Tribunal for Rwanda (ICTR).  

The fact that the Hague Tribunal was established as a subsidiary organ of the Security Council meant that all UN member states were obliged to cooperate with both the ICTY and the ICTR. So in theory they had considerable authority, not so unlike that of the Nuremberg Tribunal. There were, however, important contrasts with the situation in Europe in 1945. One of these was that the ICTY and ICTR could not impose the death penalty. Another was that indictments were not immediately followed by trials. The ICTY began to operate painfully slowly, while some of the worst events of the war in former Yugoslavia were occurring. These included the massacre at Srebrenica in July 1995, which was organized by Mladic and Karadzic, even though they had already been charged by the ICTY for their role in the bombardment of civilians in Sarejevo. In contrast, the ICTR was not established until six months after the mass killing of 1994 had stopped and many of those accused were to hand. Nevertheless, nothing seemed to happen with any urgency for several years.  

The primary constraint for the ICTY was that the commanders of NATO forces were unwilling to put their troops at risk in order to secure arrests, and correctly interpreted the setting up of the tribunal as essentially a public relations exercise. The serious business of brokering peace agreements required negotiation and compromises with the leaders of warring factions. This had become accepted as the way to deal with armed conflict. Perpetra-
tors of violence had to be given enough of what they wanted and protection from prosecution so that order could be restored, and despite the apparent weight of ICTY indictments in international law, in practice they were ignored. The first defendant, Dusko Tadic, was no more than a revolting thug who had fled to Germany, where he was recognized and arrested in Munich. He did not arrive in The Hague until 1995 and his trial did not begin for another year. It took yet another year for him to be sentenced, and two more years before the start of his appeal. Until 1998 there was no real prospect of the likes of Mladic or Karadzic, let alone Milosevic himself, being called to account.

In Arusha there were different difficulties. In contrast to reactions to the ICTY there has been eagerness among those accused of crimes to be tried by the ICTR, partly because most of them were readily brought into custody and have wanted to avoid Rwandan justice procedures, but also because the prison life offered by the tribunal has its own attractions. An obscene situation developed in which those primarily responsible for the killing were living in relative comfort, while most of their surviving victims continued to live in poverty. In the early years there were also well-grounded allegations of corruption, and there have been very serious delays in legal processes, with some defendants having to wait for many years before their trials began. Logistical arrangements for setting up the tribunal infrastructure proved to be both daunting and very expensive. Hundreds of UN personnel and defence teams had to be supported in a location that lacks the facilities available in a city like The Hague. The UN system was not flexible enough to cope, and for a while staff had to accept three-month contracts, making it impossible to recruit the best candidates. Arusha is also not a place that is closely covered by the international media, so what has been happening there has been largely overlooked. Remarkably few trials have been concluded and both the Registry (which is responsible for organizational
issues) and Office of the Prosecutor have been open to charges of serious incompetence. The lack of adequate monitoring in Arusha suggests that here too international criminal justice was a means of seeming to do something, not a genuine effort by the governments of powerful states to reassert the principles agreed in the 1940s. The one really important conviction secured by the ICTY has been that of the former Rwandan prime minister, Jean Kambanda, who made things relatively easy by pleading guilty to the crime of genocide. That happened two months after the signing of the ICC Rome Statute in 1998 – an event that had perhaps helped focus proceedings.

To be fair, even without the administrative mess, the ICTR has been in an extremely awkward position. It has had to operate without the full cooperation of the Rwandan government, which has persistently viewed the ICTR as an imposition and sop to the guilt of the international community for its failures in 1994. The foreign base of the ICTR and the lack of a death penalty meant that the new Rwandan government had actually voted against the setting up of the tribunal in the Security Council (it was a non-permanent member of the council at the time). It has pointed out that justice procedures in Rwanda itself have not been adequately supported. The genocide had devastated the judiciary, and by 1996 there were over 100,000 people awaiting trial. In this situation the manoeuvrings in Arusha were dismissed as a scandalous waste of money. Instead, it was argued, resources would be better used supporting national and local procedures, including the new gacaca system, introduced in 2001/02 and expanded in 2003/04, based on ‘traditional’ mechanisms of conflict resolution, public exposition, compensation and forgiveness.12

Another problem has been that the ICTR can investigate only alleged crimes that have taken place in 1994. In particular, this means that it cannot deal with events after the Rwandan Patriotic Front (RPF) victory in the civil war, even though the new gov-
ernment has itself been implicated in mass killings, notably in eastern Congo in the late 1990s. It has made the ICTR appear to be biased. From 2002, the Hague Tribunal chief prosecutor, Carla Del Ponte, tried to do something about this by launching investigations of several senior RPF officers for crimes allegedly committed during 1994. Not surprisingly, it produced a furious reaction from the Rwandan government, and perhaps partly as a result, the Security Council decided in 2003 to create a separate prosecutor for the ICTR, thereby replacing Del Ponte. It made it unlikely that anyone from the RPF would ever be indicted, particularly given the growing impatience with the ICTR in the Security Council, and the pressure to quickly conclude prosecutions.

In contrast, more recent events at the ICTY have made it seem something of a success story. From 1998, again the year of the ICC’s Rome Statute, NATO forces began to be more serious about arrests. At first it was middle-level figures, such as concentration camp commandants, but soon it was also generals, and even Karadzic’s successor as Bosnian Serb president. Quite suddenly, more than half of those indicted were in custody. Then, in June 2001, Milosevic himself was handed over by Serbia, effectively in return for a large reconstruction grant. His trial began the following February. At first it did not seem to go well for the prosecution. Milosevic used the public platform to present his own political analysis, and he also proved very effective at undermining some of the prosecution’s first witnesses. All this was watched with interest on television in former Yugoslavia, increasing his prestige in some quarters. But as time has passed he has been worn down and diminished. His reputation has gradually been taken apart by the relentless presentation of evidence.

Whatever the limitations of the ICTY and the ICTR, the creation of the Hague Tribunal did help clarify and crystallize various issues in international law during the 1990s, as well as extend its potential application. It reconnected it with the
idea of international criminal prosecution, something that had
been almost entirely ignored since the 1940s. It established that
international jurisdiction to punish both war crimes and crimes
against humanity applied to all states, whether or not they are
engaged in international armed conflict. It also reiterated that
individuals can be held to account for crimes against humanity,
war crimes or genocide under international law, and in the lat-
ter case secured pioneering convictions. Unlike Nuremberg, it
foregrounded rape as a war crime, and in addition established
it as a crime against humanity when committed systematically
and on a large scale. Perhaps most importantly of all, the ICTY
and ICTR provided experience of actually running international
criminal proceedings, something that had never actually been
done before if Nuremberg is discounted as an arrangement be-
tween four victorious allies. In so doing they suggested models
and principles that could be drawn upon in other situations.

One aspect of this has been applications of the concept of
‘universal jurisdiction’. This holds that all national judicial sys-
tems have an obligation to investigate and adjudicate the most
grievous crimes, because they affect all humanity. The most spec-
tacular example was the arrest of General Pinochet in London in
October 1998.\textsuperscript{13} Others include the indictment of Ariel Sharon in
Belgium by lawyers representing survivors of the Shatila and Sabra
massacres; the prosecution in Senegal of the former president
of Chad, Hissène Habré; and the prosecutions of Rwandans for
crimes perpetrated in their own country by a military tribunal in
Switzerland and by a civil court in Belgium. The Hague Tribunal
has also made internationally supported criminal justice mechan-
isms a serious prospect elsewhere too. Apart from being a factor
in the setting up of a permanent international court, it influenced
the emergence of new localized legal arrangements, such as the
agreement between the UN and the Cambodian government to
try some surviving Khmer Rouge leaders for atrocities perpetrated
in the 1970s, the setting up of a hybrid judicial system in Kosovo, and the creation of the Special Court for Sierra Leone (SCSL). The latter began to operate just a few months before the Rome Statute came into force, and has raised issues of relevance for the Ugandan intervention.

In 2000, Security Resolution 1315 recorded an arrangement between the UN and Sierra Leone to try those who bear the greatest responsibility for serious violations of international and Sierra Leonean law. Following several more months of continuous upheaval in the country, the court was finally established in January 2002 once British military intervention had imposed a degree of political stability. Like the ICTY and ICTR, the SCSL is an ad hoc response to a particular situation, linked to agreement in the Security Council, including support from the USA. But it differs from them in that it is a treaty-based court. In this respect it is similar to the ICC. Its rules of procedure follow those of the ICTR, but staff are a mixture of UN appointments and Sierra Leonean nationals, the majority of judges being appointed by the UN Secretary General. The hearings take place within Sierra Leone and the proceedings are, in effect, an extension of Sierra Leone’s judiciary. This means that some of the difficulties that have arisen with the ICTR, and to a lesser extent the ICTY, might be avoided or ameliorated. It has not stopped the SCSL being locally controversial, but it more clearly aims at enhancing domestic legal processes through an international component, rather than laying down the law from a distance.

The fact that the SCSL is treaty based has, however, also proved to be a problem. The international criminal tribunals, as the creations of the Security Council, have considerable authority. No member state of the UN can legitimately refuse to recognize warrants – although, as we have seen, they may choose to ignore them in practice. This is less clear for the SCSL. In 2003, the SCSL indicted Charles Taylor, who was at the time still president of
Liberia. Liberia was not party to the treaty between Sierra Leone and the UN, and refused to recognize the warrant. To make matters worse, after Taylor left office he was given political asylum in Nigeria, which also refused to arrest him. Efforts were made to negotiate a solution, with the USA offering a reward of $2 million to anyone who would help remove Taylor to Sierra Leone to face trial. These developments have done nothing to enhance the Special Court’s standing or the status of its warrants. It is a lesson that the ICC has not ignored.

The creation of the ICC

The decision to create a permanent international criminal tribunal or court dates back to the late 1940s. The wording of the Genocide Convention indicated that one would be established, and draft structures were prepared by the International Law Commission (ILC), the UN body responsible for codifying international law. But during the cold war these came to nothing. In the late 1980s President Gorbachev suggested resurrecting the idea as a means of dealing with terrorism, and interest was also expressed in the potential role of such a court in combating drug trafficking. It was the generally positive public reaction in rich countries to the setting up of the Hague Tribunal, however, which finally accelerated the process. The ILC was asked to come up quickly with a new proposal. This proved to be an exceedingly cautious affair, reflecting a continuing determination to resist any infringements on sovereignty. The ILC suggested setting up a court that would become involved in a case only if there was a referral from a state that was party to an international criminal law convention (such as the Genocide Convention) and had jurisdiction over the person accused of the relevant crime. In 1995, the UN General Assembly established a committee to seek views about the proposal and prepare a draft statute, but by that point there was a growing interest in something more ambitious.
The Rome Conference of 1998 was the last of a series of consultation meetings. It was supposed to agree a statute, ideally based on a consensus of all the participating states. There remained serious disagreements to resolve, however. Basically UN member states fell into three groups. One faction, mostly for obvious reasons, did not really want any sort of permanent international criminal court. It included Libya, Indonesia, Iran, Iraq and India. A second group wanted a court that could be activated only by the UN Security Council. It would therefore not be opposed by the USA and other permanent members, because they could be sure it would never act against their interests, and would be empowered, like the Hague Tribunal, under Chapter VII of the UN Charter. This was the kind of court wanted by the Clinton administration, as well as China and France. Ranged against these two groups were more than forty states and several hundred non-governmental agencies and associations. This group was far from homogeneous, but wanted a more powerful court, with an independent prosecutor unhindered by the Security Council. Canada and Germany were among those countries pushing for this kind of option, joined by the UK after the Labour Party came to power in 1997.

Several of those states wanting an independent court were keen to keep the USA on board. President Clinton had been vocal in support of an international criminal court, notably during his visit to Rwanda, so it was hoped that the USA would accept a majority view of what it should be like. In retrospect this was rather naive. Whatever the Clinton administration decided, it would have been very unlikely that Congress would have approved ratification for a very long time. It had, after all, taken the USA forty years to ratify the Genocide Convention, and there was fierce Republican opposition to overcome. In the event, on the final day of the conference the US delegation was still holding out for limitations on the powers of the court, particularly with respect
to its jurisdiction over US peacekeeping forces. By this point in the proceedings the USA seems to have wanted the negotiations to break down, and so called for a vote on the existing draft. Its expectation may have been that other states would be unwilling to vote in favour of it without US support, and perhaps also without revising some of the more muddled, repetitive and redundant passages. They were wrong. Exasperated by US intransigence, only seven of the 148 participating states voted against it.

The statute of the International Criminal Court that emerged from the Rome Conference established a permanent and ostensibly independent institution, based at The Hague, with power to exercise jurisdiction over genocide, crimes against humanity, war crimes and, at some future date, the crime of aggression. It reiterates definitions of crimes in the various international criminal agreements adopted since the Genocide Convention, clarifies crimes against humanity, and confirms that war crimes may be committed during ‘internal’ or civil wars. It also emphasizes that individuals may be held to account, and that command responsibility is a basis for liability. A crime against humanity includes any of a list of crimes ‘committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’. Significantly for the situation in northern Uganda, the list includes murder; enslavement; deportation or forcible transfer of population; and sexual violence such as rape, sexual slavery and forced pregnancy. Confusingly these crimes are repeated in the lists of war crimes, sometimes with a change of wording. Among those war crimes listed in cases of ‘armed conflict not of an international character’ are mutilation; taking of hostages; extra-judicial executions; intentionally directing attacks against the civilian population; pillaging; conscripting or enlisting children under the age of fifteen; ‘ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons
so demand’; and the same sexual crimes as mentioned in the article relating to crimes against humanity. Certain other issues are avoided altogether or sidestepped in the statute. The use of landmines and nuclear weapons are prime examples. Also, the failure of the Rome Conference to agree a definition of the crime of aggression was a serious disappointment. It was, after all, one of the main crimes that the UN system was set up to prevent.

As for the capacities of the court, the group of states and NGOs wanting a powerful and independent prosecutor achieved only a part of what they wanted, reflecting a desire to placate the USA. Significantly, Article 1 of the statute states that the court ‘shall be complementary to national criminal jurisdictions’, indicating that it does not have the kind of primacy of jurisdiction mandated to the ICTY and ICTR, but intervenes only when state parties are unable or unwilling to act. In a series of overlapping articles (13–16) it is explained that the exercise of the court’s jurisdiction can begin in three ways. The prosecutor may initiate investigations on the basis of information on crimes within the jurisdiction of the court. If he or she concludes that there is a reasonable basis to proceed with an investigation, he or she can submit to the Pre-Trial Chamber a request for authorization. Alternatively, a state party (i.e. one of the states that have ratified the statute) can refer a situation to the court, or a situation may be referred to the prosecutor by the Security Council acting under Chapter VII of the UN Charter. It is also stipulated that no investigation or prosecution may be commenced or proceeded with for a period of twelve months after the Security Council has requested the court to that effect in a resolution adopted under Chapter VII. In addition, the statute states repeatedly that the court must act ‘in the interests of victims’ (Articles 53, 54, 65, 68) and ‘in the interests of justice’ (Articles 53, 55, 61, 65, 67), and provides generous provision for ‘the rights of the accused’ (e.g. Article 68).
All this means is that the ICC is potentially under the control of the Security Council, and to the extent that it is not under its control, the Office of the Prosecutor is constrained by the ICC judges in the Pre-Trial Chamber, by the requirement to work in conjunction with national judiciaries, and by a range of limitations on his or her power, potentially including extra-judicial considerations. As the ICC does not have its own police force, any investigation initiated by the prosecutor cannot proceed very far without the approval of the state involved. The prosecutor has to rely on the support of the state in order to carry out investigations on the ground and to arrest suspects if warrants are served. It is unlikely that a state that is not party to the ICC would be willing to do this, unless there is a Security Council resolution. Also, those states that are party to the ICC are not likely to be ruled by governments perpetrating acts that they think will fall under the jurisdiction of the court. In a prescient passage, Geoffrey Robertson has observed that:

... nobody occupying a position of current political or military power in any state (even one that has ratified the Treaty) is likely to be put on trial unless they invade another state and commit war crimes on its territory ... The class of criminal most likely to be arraigned by their state’s consent at The Hague comprises persons who commit barbaric crimes in a cause which has utterly failed, in a country which decides to surrender them because it lacks the facilities to try them itself. In all other respects, the ICC will become a kind of ‘permanent ad hoc’ tribunal, dependent on references from the Security Council to investigate crimes against humanity in countries ... where none of the combatants have superpower support.

To a very large extent, the USA achieved its goal at the Rome Conference in that the ICC is very unlikely ever to prosecute a US citizen, even if the USA ratifies the treaty. The ICC prosecutor
could in theory launch an investigation into crimes allegedly committed by US peacekeepers, but a case could only ever be heard in The Hague if the USA itself showed no interest in pursuing the case in a court martial or through the US domestic courts. Moreover, the possibilities of the ICC prosecutor launching an investigation of crimes allegedly committed by an ally of the USA are exceedingly remote, given that it would require a referral from the state itself or from the Security Council, thereby requiring US support. For these reasons, President Clinton did eventually sign the Rome Statute, although no serious effort was made to ratify it. This meant that the statute was not legally binding, although under the terms of the 1969 Vienna Convention on the Law of Treaties, the USA was ‘obliged to refrain from acts which would defeat the object and purpose’ of the ICC. In effect this allowed the USA to adopt a wait-and-see attitude to the court. Some time in the future, when it is clear that it would never act against US interests, then a case might be made for ratification in Congress. The Bush administration has found even this unacceptable, however.

The response to the murder of some three thousand people in the al-Qaeda attack on the World Trade Center and Pentagon has been to declare war on terrorism. One aspect of this policy was to produce a list of terrorist organizations, which included the LRA. Another has been to effectively set aside conventions and agreements that US governments have in the past sponsored and ratified. These include parts of the UN Charter, some of the Geneva Conventions and Protocols, and the Convention against Torture. It has also exacerbated distrust of the ICC. On 25 September 2001 the Bush administration supported the American Servicemembers’ Protection Act, which was intended to stop military aid to states choosing to ratify the Rome Treaty, and to use military force against any country that arrests US ‘servicemembers’ on ICC warrants. Initially, appalled European
allies persuaded the White House to withdraw its support for the bill, but in May 2002 the administration announced that it would ‘unsigned’ the Rome Statute, and Congress passed the American Servicemembers’ Protection Act three months later. Aid to countries that have ratified the Rome Statute has continued, but a condition is that they enter into bilateral arrangements with the USA not to accept ICC warrants for US citizens. It can be argued that such arrangements are unlawful, but many countries have been compelled to comply, including Uganda. The USA has also, until very recently, refused to allow mention of the ICC in Security Council resolutions.

The US attitude to the ICC, like the US approach to discussions at the Rome Conference, has irritated other states. Although behind the scenes there has been some quiet cooperation with the court, the public position of the administration has been openly hypocritical. No attempt has been made to disguise the premise that international laws are important to regulate the actions of the rest of the world, but that they do not apply to the USA. The strategy backfired in that it appears to have encouraged many states to quickly ratify the Rome Treaty to demonstrate their independence. As a result the ICC was theoretically up and running from mid-2002, meaning that it potentially had jurisdiction over crimes committed after that date, although the construction of its building was still going on and most staff were not yet in place. This is an extraordinary development, but it would be a mistake to read too much into it. There has not yet been a radical change in international relations.

The criminal tribunals set up in the 1990s highlighted actual and potential problems in implementing international criminal prosecutions which have by no means been resolved. For obvious reasons, many government officials and diplomats still prefer political arrangements to the allocation of accountability. Even those with little to hide find it expedient to ignore the failings
of others. There are also good reasons why impunity has so often been offered in the past, and not all those reasons went away with the end of the cold war. Most peace negotiations still involve some form of amnesty, even if it is linked to an ‘outing’ of the truth in a peace and reconciliation commission, such as occurred in South Africa. Moreover, ending impunity for the most egregious of crimes is not the same as establishing justice in a broad sense. It may not even be viewed as an ideal response to atrocities by surviving victims, or as a necessary aspect of making peace.

At the time of the setting up of the Hague Tribunal there was talk in the Security Council of ‘healing of the psychological wounds’, and the resolution setting up the ICTR explicitly stated that it should help bring peace and reconciliation. The first president of the ICTY explained that: “Trials establish individual responsibility over collective assignation of guilt; ... justice dissipates the call for revenge, because when the Court metes out to the perpetrator his just deserts, then the victim’s calls
for retribution are met; ... victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for their crimes.\textsuperscript{20}

But is this really so? Even if we leave aside the issue that indicting those alleged to be most accountable for terrible acts may preclude negotiations with the very individuals who could limit levels of violence, are prosecutions themselves therapeutic? Is it helpful to have a scapegoat, focusing anger and bitterness, and ameliorating divisions through ritualized public humiliation? Or does an international criminal trial have the opposite effect, making it clear why people should hate each other?

Would it not be better, as the Rwandan government has argued, if more locally relevant mechanisms of justice were deployed, so that those affected by crimes can themselves decide when it is appropriate to punish and when it is appropriate to forgive? Many analysts and activists responding to the ICC’s intervention in Uganda would agree. One highly critical article refers to the dangers of ‘international law fundamentalism’ and proposes that:

\begin{quote}
The decision, on the one hand, to seek justice through punishment or, on the other, to forgo punishment in favour of justice through reconciliation, is a decision that must be made by the concrete community that is the victim of the crimes and that will have to live with the consequences of the decision. ‘Humanity’ is too thin a community upon which to base a universal right to punish ... If local injustice is the price to be paid for the kind of international justice that results from ICC prosecution, then we must abandon the Court and imagine new modes of building a truly global rule of law.\textsuperscript{21}
\end{quote}

As we shall see, it is an example of the kind of view that the ICC has been unable to ignore. How it has responded is shaping what it will become.