ARTICLES

UNLOCKING THE MYSTERIOUSNESS OF COMPLEMENTARITY: IN SEARCH OF A *FORUM CONVENIENS* FOR TRIAL OF THE LEADERS OF THE LORD'S RESISTANCE ARMY

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I. INTRODUCTION

In December 2003, the President of Uganda, Yoweri Museveni, invited the Prosecutor of the International Criminal Court (ICC) to investigate the Lord's Resistance Army's (LRA) commission of serious international crimes.[1] The referral followed almost two decades of conflict between the Ugandan army and LRA forces, several failed peace negotiations, and offers of domestic amnesty to the LRA rebels.[2] Interestingly, Uganda's "self-referral"[3] and the consequent threat to arrest, detain, and hand over the leaders of the LRA for trial at the ICC, appear to have produced a new willingness on the part of the rebels to negotiate peace.[4] As a precursor to signing a comprehensive peace agreement, the LRA rebels agreed to submit to domestic accountability processes if the ICC warrants were dropped.[5] In 2007 and 2008, the Ugandan government and LRA rebels concluded two important agreements, which called for domestic accountability for the LRA's crimes through the establishment of a national court to prosecute alleged perpetrators of serious international crimes.[6] Because these

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[1] Press Release, Int'l Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004), *available at* http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/ (follow "Press Releases (2004)" hyperlink; then follow by date).

[2] Manisuli Ssenyonjo, *Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court*, 10 J. CONFLICT & SECURITY L. 405, 405–07 (2005); Kasaija Phillip Apuuli, Note and Comment, *The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda*, 4 J. INT'L CRIM. JUST. 179, 183–84 (2006).

[3] The notion of "self-referral" derives from Article 14 of the Rome Statute. Rome Statute of the International Criminal Court art. 14, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. For a discussion of its history and significance in the context of the ICC's work, see Payam Akhavan, *Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?*, 21 CRIM. L.F. 103 (2010).

[4] Kasaija Phillip Apuuli, Note and Comment, *The ICC's Possible Deferral of the LRA Case to Uganda*, 6 J. INT'L CRIM. JUST. 801, 802 (2008).

[5] *Id.* at 804–05.

[6] Agreement on Accountability and Reconciliation, Uganda-Lord's Resistance Army, June 29, 2007 [hereinafter Agreement], *available at* http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_And_Reconcilition.pdf; Annexure to the Agreement on Accountability and Reconciliation, Uganda-Lord's Resistance Army, Feb. 19, 2008 [hereinafter Annexure], *available at* http://www.coalitionfortheicc.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf. The Agreement was negotiated between the Government of Uganda and the Lord's Resistance Army, under the mediation of General Riek Machar Teny-Dhurgon, Vice President of the Government of South Sudan. It was witnessed by the Governments of the Republic of Kenya and the United Republic of Tanzania. Agreement, *supra*.

agreements provided for domestic criminal prosecutions and traditional justice, questions have arisen about the continued admissibility of the LRA case before the ICC. This is due to the application of the principle of complementarity, under which the primary responsibility for investigating and prosecuting crimes within the jurisdiction of the ICC falls to States, while the Court provides an alternative forum where national jurisdictions do not investigate or prosecute.[7]

This Article discusses the impact of the domestic political and legal developments on the admissibility of the LRA case. It challenges the suitability of a formal textual approach to determining admissibility and suggests that, given the delicate legal and political context of the Ugandan situation, it would be inappropriate to base the forum choice exclusively on the strict letter of the Rome Statute of the International Criminal Court (the Rome Statute).[8]

Given the competing claims of advocates of "peace without justice" and "justice without peace,"[9] this Article asserts that a strict retributive justice approach[10] is unsuitable for the Ugandan situation. The Article does not aim to rekindle the age-old debate that posits that *peace* and *justice* are polar opposites. However, to set the stage for the ensuing discussion regarding the most appropriate forum to try the LRA leadership, this Article recognizes that it would be untenable to pursue justice in its Western, international incarnation, without regard for the wishes and aspirations of the people most directly affected by the Ugandan internal conflict.

The views of the people of Uganda, especially victims from the Acholi community in the northern part of the country,[11] regarding the various means by which those allegedly responsible for the most serious crimes in Northern Uganda could be held accountable, must be taken seriously. For example, the argument that traditional accountability processes may be more suitable

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[7] The preamble to the Rome Statute, *supra* note 3, notes the duty of every State to exercise its jurisdiction over alleged perpetrators of international crimes, and that the ICC shall be complementary to national criminal jurisdictions. Article 1 of the Rome Statute also provides that the ICC shall be complementary to national criminal jurisdictions. *Id.* art. 1.

[8] *Id.*

[9] Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 804 (2006).

[10] *Id.* at 819. In this context, the retributive justice claim is based on the argument that those who commit crime deserve punishment "as a moral imperative," or alternatively, on the argument that the ICC has an institutional mandate to prosecute perpetrators of serious international crimes. *Id.*

[11] The Acholi community is the community most affected by the LRA. *See infra* notes 106–08, 115–17 and accompanying text.

for communal reconciliation and lasting peace should not be taken lightly or set aside. After all, the best form of "justice" for a population that has been subjected to over two decades of brutal violence is peace—a peace that enables them to return to their homes, to resume farming for their food, to rear their animals, to bring up their children, and to make day-to-day choices in life as a dignified people.[12] To insist on justice at the ICC, irrespective of how that might impact efforts to find a durable peace in Uganda, risks defeating the goals of both peace and justice. Therefore, this Article suggests that a decision on the most appropriate forum for the LRA trial must not only be informed by the legal and moral imperatives to try Joseph Kony[13] and the other LRA leaders for the serious crimes for which they have been accused and the numerous victims in Northern Uganda, but also take into account how the forum choice might affect other goals, such as peace, victim participation in the justice process, deterrence, and legitimacy of the trial.

This Article ultimately suggests a consequentialist approach[14] to the question of forum choice. It concludes that, in theory, Uganda-based trials offer the best prospect of attaining both peace and justice. However, it also recognizes that this option will remain illusory unless Uganda overcomes its two decade-long inability to arrest the LRA leadership or to peacefully convince them to surrender. In addition, if and when the LRA leadership is arrested or surrenders, and Uganda chooses to embark on a domestic accountability process, the country must do more to bring about genuine and credible prosecutions that meet international standards.

This Article is organized as follows: Part II provides background necessary to understand Uganda's referral to the ICC; Part III discusses the law and jurisprudence on complementarity and admissibility under the Rome Statute; Part IV addresses the legal developments in Uganda that are relevant to a future domestic trial of the LRA leadership; Part V makes arguments in support of domestic prosecution of the LRA, given the equally important

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[12] *See* Moses Chrispus Okello, Head, Research & Advocacy Dep't, Refugee Law Project, Address at the International Conference on Peace and Justice: The False Polarisation of Peace and Justice in Uganda, at 4 (June 25–27, 2007), *available at* http://www.peace-justice-conference.info/download/WS-2-Expert%20Paper-Okello.pdf (arguing that "the greatest justice one can deliver to a people living in conflict is to enable them to enjoy some sort of peace *and* enable them to have a say in how *they* think justice should be done—*and to whom*").

[13] Joseph Kony is the alleged founder and leader (Chairman and Commander in Chief) of the LRA. Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05-53, Warrant of Arrest, para. 7 (as amended Sept. 27, 2005), http://www.icc-cpi.int/iccdocs/doc/doc97185.PDF.

[14] A consequentialist approach holds that "crimes of this magnitude must be punished in order to prevent their recurrence through deterrent, incapacitative, or norm-reinforcing effects of punishment." Blumenson, *supra* note 9, at 819.

goals of justice and peace; Part VI draws lessons from the referral jurisprudence of the United Nations International Criminal Tribunal for Rwanda (ICTR) that could arguably guide Uganda's national trials of the LRA; Part VII sets out procedural options available to Uganda under the Rome Statute and the ICC system of justice, if the country wishes to challenge the admissibility of the LRA case before the ICC; and Part VIII provides a few concluding remarks.

II. FACTUAL CONTEXT OF THE REFERRAL

Uganda's self-referral under Articles 13(a) and 14 of the Rome Statute invited the ICC Prosecutor, Luis Moreno-Ocampo, to investigate serious international crimes allegedly committed by members of the LRA during the twenty years of internal armed conflict that commenced in 1986.[15] In July 2004, the ICC Prosecutor "determined that there [was] a reasonable basis to open an investigation into the situation concerning Northern Uganda,"[16] and he applied to Pre-Trial Chamber II[17] for arrest warrants against five top leaders of the LRA.[18] The warrants, which were issued in July 2005 and

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[15] Press Release, *supra* note 1; Apuuli, *supra* note 2, at 179–80. The issue of whether the Rome Statue permits self-referrals remains a contested one. Payam Akhavan suggests that, despite the complementarity principle, nothing in the Rome Statute or its negotiating history prohibits such referrals and notes that there may be domestic circumstances that justify turning to the ICC in exceptional situations. Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403, 414 (2005). On the other hand, Arsanjani and Reisman argue that during the Rome Treaty negotiations, no one envisaged the possibility that governments would want to invite the ICC to investigate and prosecute crimes that occurred on their territory and that, therefore, no provision was made to cover this eventuality. Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385, 386–87 (2005). However, the ICC Pre-Trial Chamber has endorsed the legality of self-referrals by accepting them from three African countries—Uganda, the Democratic Republic of the Congo, and the Central African Republic. Andreas Th. Müller & Ignaz Stegmiller, *Self-Referrals on Trial: From Panacea to Patient*, 8 J. INT'L CRIM. JUST. 1267, 1268 (2010).

[16] Press Release, Int'l Criminal Court, Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda (July 29, 2004), *available at* http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/ (follow "Press Releases (2004)" hyperlink; then follow by date).

[17] There are two chambers in the Pre-Trial Division of the ICC, each assigned to particular cases, that "play[ ] an important role in the first phase of judicial proceedings until the confirmation of charges upon which the Prosecutor intends to seek trial against the person charged." *Pre-Trial Division*, INT'L CRIM. CT., http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/pre%20trial%20division/pre%20trial%20division?lan=en-GB (last visited Nov. 11, 2011).

[18] Press Release, Int'l Criminal Court, Warrant of Arrest Unsealed Against Five LRA

made public three months later, charged Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya with multiple counts of crimes against humanity and war crimes.[19] These include murder, rape, pillage, enslavement, sexual slavery, cruel treatment, enlisting children in armed conflict, and attacks against the civilian population.[20]

Uganda's referral, however, did not prevent it from continuing to negotiate with the LRA for a peaceful settlement of the conflict.[21] This was due to the view of a sizeable part of the victim population in Northern Uganda, including religious and traditional leaders and members of Parliament, that the ICC referral could give further impetus to the war and provoke reprisal attacks by the LRA against those perceived to support the government in Kampala, Uganda's capital.[22] In addition, the government's peace initiative was a realistic acknowledgement of its inability to arrest Joseph Kony and the LRA leadership for nearly two decades. Given the government's inability to arrest the LRA or otherwise bring the conflict to an end, a comprehensive peace agreement that would encourage the voluntary surrender of LRA members was therefore deemed a reasonable or pragmatic option, especially when combined with processes for domestic accountability.[23]

In 2007 and 2008, the Ugandan government and the LRA adopted two important agreements, which provided for national, instead of international, trials of war-related crimes.[24] Following the conclusion of these agreements, several Ugandan government officials, including President Museveni, suggested that the LRA case would no longer be admissible at the ICC, that Kony would be tried in Uganda, and that the government could ask the ICC to withdraw the arrest warrants.[25] However, as discussed in detail in the next

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Commanders (Oct. 14, 2005), *available at* http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/ (follow "Press Releases (2005)" hyperlink; then follow by date).

[19] *Id.*

[20] *Id.* Kony and Otti are each sought for 33 and 32 counts, respectively, of war crimes and crimes against humanity; Odhiambo faces 10 counts; Ongwen 7 counts; and Lukwiya 4 counts. *Id.* On July 11, 2007, the Pre-Trial Chamber terminated proceedings against Lukwiya after receiving confirmation of his death. Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05-248, Decision to Terminate the Proceedings Against Raska Lukwiya (July 11, 2007), http://www.icc-cpi.int/iccdocs/doc/doc297945.PDF.

[21] Apuuli, *supra* note 2, at 183–85.

[22] *Id.*

[23] *Id.* at 183–84.

[24] *See* Agreement, *supra* note 6; Annexure, *supra* note 6.

[25] *Uganda: Interview with President Yoweri Museveni*, INTEGRATED REG'L INFO. NETWORKS (June 9, 2005), http://www.irinnews.org/report.aspx?reportid=54853. President Museveni is quoted to have said, "If we told the ICC that we had found an internal solution, they would be

section, this argument was predicated, perhaps, on Uganda's misunderstanding of the operation of the complementarity principle, under which the ICC is only empowered to investigate or prosecute international crimes within its jurisdiction if the relevant national system is not doing so. However, once the Court's jurisdiction is triggered, States cannot prosecute the same case without an order from the ICC.[26]

III. COMPLEMENTARITY AND ADMISSIBILITY UNDER THE ROME STATUTE

Under the Rome Statute, the cornerstone of the relational architecture between the ICC and States Parties is the principle of complementarity set out in the Preamble and stipulated in Article 1.[27] Unlike the ad hoc tribunals for Rwanda and the former Yugoslavia, which enjoy primary jurisdiction to try serious international crimes enumerated in their respective statutes,[28] the Rome Statute makes States Parties primarily responsible for trying perpetrators of crimes that fall within the ICC's subject matter jurisdiction.[29] According to the ICC's Pre-Trial Chamber, complementarity is "the cornerstone of the Statute," and is the principle that reconciles "the States' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes."[30] Consequently, the ICC only possesses *add on*, *last resort*, or *fall back* jurisdiction, which is triggered where the admissibility criteria under the Statute are satisfied. Complementarity operates as a

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happy." *Id.* The President is further reported to have stated that, if the LRA were to stop fighting and agree to a "blood settlement," Uganda would not want the ICC to intervene further. *Id.* As discussed below *infra* text accompanying notes 74–75, the ICC Judges have clearly found that the Rome Statute does not permit Uganda to withdraw its referral of the LRA case.

[26] *See infra* note 75 and accompanying text.

[27] Rome Statute, *supra* note 3, pmbl., art. 1. The Preamble to the Rome Statute recognizes "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and emphasizes that the ICC "shall be complementary to national criminal jurisdictions." *Id.* pmbl. Article 1 establishes the ICC as a permanent body with "jurisdiction over persons for the most serious crimes of international concern . . . [which] shall be complementary to national criminal jurisdictions." *Id.* art. 1.

[28] Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 8, para. 2, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 1877, art. 9, para. 2, U.N. Doc. S/RES/1877 (July 7, 2009) (amending S.C. Res. 827 (May 25, 1993)).

[29] Rome Statute, *supra* note 3, pmbl., art. 1.

[30] Prosecutor v. Kony, Case No. ICC-02/04-01/05-377, Decision on the Admissibility of the Case Under Article 19(1) of the Statute, para. 34 (Mar. 10, 2009), http://www.icc-cpi.int/iccdocs/doc/doc641259.pdf [hereinafter Kony Decision on Admissibility].

mediating principle to resolve tensions arising from the interplay of domestic and international criminal jurisdictions under the Rome system of justice.

The issue of admissibility under the ICC regime has been one of controversy and confusion. Two predominant views stand out in the literature. First, some scholars suggest that the principal criterion for determining whether a case is admissible before the ICC is whether the State is conducting domestic proceedings in the form of either an investigation or prosecution.[31] Second, in what has now become known as the "slogan version" of complementarity, other scholars argue that a case is admissible before the ICC only if the primary jurisdiction state is "unwilling" or "unable" to conduct domestic proceedings.[32]

Article 17, the governing provision, stipulates negative conditions, i.e., circumstances when a case will be inadmissible before the Court.[33] It expressly recalls the principle of complementarity, and then lists four separate grounds of inadmissibility as follows: (a) the fact that a "case is being investigated or prosecuted by a State . . . *unless the State is unwilling or unable genuinely to carry out the investigation or prosecution*"; (b) a State has investigated a case and "decided not to prosecute . . . *unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute*"; (c) the person has been tried for the same conduct for which a complaint has been made to the ICC and a subsequent trial will violate the Statute's *ne bis in idem* rule; and (d) "[t]he case is not of sufficient gravity" to be tried by the ICC.[34]

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[31] Darryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 CRIM. L.F. 67, 67 (2010); Danielle E. Goldstone, Comment, *Embracing Impasse: Admissibility, Prosecutorial Discretion, and the Lessons of Uganda for the International Criminal Court*, 22 EMORY INT'L L. REV. 761, 785 (2008) ("[C]ontrary to the common articulations of admissibility, inability or unwillingness is not the test itself, but rather an exception to the default rule that a case under investigation by a state with jurisdiction is inadmissible."); Akhavan, *supra* note 15, at 414 ("An ordinary interpretation of Articles 17(1)(a) and (b) indicates that unwillingness or inability is relevant only when a state has investigated or prosecuted a case; when it has not done so, there is no express requirement of establishing unwillingness or inability as a precondition for the exercise of jurisdiction.").

[32] Robinson, *supra* note 31, at 67–68; George H. Norris, Note, *Closer to Justice: Transferring Cases from the International Criminal Court*, 19 MINN. J. INT'L L. 201, 219 (2010); Arsanjani & Reisman, *supra* note 15, at 386–87; William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 757 (2008) (arguing that "[t]he two prongs of the complementarity test are well known, even to non-specialists: the state must be 'unwilling or unable genuinely' to investigate or prosecute").

[33] Rome Statute, *supra* note 3, art. 17, para. 1.

[34] *Id.* (emphasis added); *see also id.* art. 20 (describing the *ne bis in idem* principle as a prohibition on being tried twice for the same offense).

Given the above wording of Article 17, the better view seems to be that a case is inadmissible before the ICC only when national proceedings, in the form of an investigation or prosecution, are taking or have taken place. This view is also shared by the ICC judges, who have held that "the paramount criterion for determining admissibility of a case is the existence of a genuine investigation and prosecution at the national level in respect of the case."[35] However, national proceedings do not automatically bar admissibility. By way of the unwilling or unable exception, the drafters of the Rome Statute introduced a qualitative criterion, which enables the ICC to assess the genuineness of the national proceedings.[36]

The standard of admissibility under the Rome Statute, therefore, consists of a two-part test.[37] The Pre-Trial Chamber first considers whether national proceedings (in the form of an investigation or prosecution) are taking or have taken place.[38] If the answer to this question is in the negative—in other words, there are no national proceedings—then there is no bar to admissibility.[39] However, where there are national proceedings, then the second step's qualitative assessment becomes relevant in determining an admissibility challenge.[40] In carrying out the latter assessment, the Pre-Trial Judges will examine whether: (a) the national proceedings are being held to shield particular individuals from responsibility, (b) there has been inordinate delay that reveals the intent not to prosecute the person(s) concerned, or (c) the proceedings lack independence or impartiality.[41] Similarly, a State will be found unable to prosecute where its judicial system has totally or substantially collapsed; where it fails to arrest the accused; where it fails to

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[35] Kony Decision on Admissibility, *supra* note 30, para. 36.

[36] Robinson, *supra* note 31, at 71 ("[A]lthough much of the literature fixates exclusively on the 'unwilling/unable' test . . . the 'unwilling/unable' test is only an *exception* to the basic conditions specified in Article 17(1)(a), (b) and (c) . . . .").

[37] *Id.* at 87.

[38] *Id.* at 85–87 (arguing that the drafting history of Article 17 supports the interpretation that "national proceedings" must entail an investigation or prosecution).

[39] *Id.* at 87.

[40] *Id.*

[41] Rome Statute, *supra* note 3, art. 17, para. 2. A good example of (a) and (b) above is Sudan's establishment of a Special Criminal Court purportedly to try crimes committed in Darfur. Sudan announced the establishment of the Court a day after the ICC Prosecutor's announcement of his intention to open investigations into the Darfur situation, convincing many that the real objective of Sudan's announcement was to oust the ICC's jurisdiction. *See Lack of Conviction: The Special Criminal Court on the Events in Darfur*, HUM. RTS. WATCH, June 2006, at 5, 8; *Entrenching Impunity: Government Responsibility for International Crimes in Darfur*, HUM. RTS. WATCH, Dec. 2005, at 68–69 ("The timing and speed of the tribunal's establishment was another effort to defeat the ICC's jurisdiction over crimes in Darfur, as some Sudanese officials even acknowledged.").

secure evidence; or is not able to get witnesses for the trial.[42] In other words, although the Rome Statute gives primacy to national prosecutions, sham proceedings at the national level are insufficient to render a case inadmissible before the ICC.

One could argue that, since Uganda referred the LRA case to the ICC in the exercise of its sovereign rights, there should be little or no debate about its cooperation with the ICC or, indeed, the appropriate forum for the LRA trial. However, as mentioned earlier, political and legal developments in Uganda since the self-referral have raised various issues, including the government's willingness to cooperate with the ICC, whether there is a legal basis for Uganda to withdraw the self-referral,[43] and, most significantly, given the subsequent advances in peace negotiations and adoption of at least two agreements on domestic accountability, whether there is reason for the ICC to defer[44] to Ugandan jurisdiction—at least for now.

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[42] *See* Rome Statute, *supra* note 3, art. 17, para. 3 ("In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."). For example, in the Pre-Trial Chamber's decision, it noted Uganda's argument that, for almost two decades, it "had been unable to secure [the] arrest" of Kony and others allegedly "bearing the greatest responsibility for the crimes" committed in Northern Uganda and Uganda's assertion of this fact as a basis for its support of the LRA trial at the ICC. *See* Kony Decision on Admissibility, *supra* note 30, para. 37. Arsanjani and Reisman argue that "[t]here is no evidence" that Uganda's national judicial system had totally or substantially collapsed and, further, that the government's inability to arrest "the accused or to conduct investigations in the north" has nothing to do with the national judicial system. Arsanjani & Reisman, *supra* note 15, at 395. However, that the government has been unable to arrest the LRA leaders for over twenty years is relevant to the admissibility of the case pursuant to the express terms of the Rome Statute.

[43] The Rome Statute provides for the possibility that a State with jurisdiction may challenge the admissibility of a case. Rome Statute, *supra* note 3, art. 19, para. 2. Under Article 19(2)(b), "[a] State which has jurisdiction over a case, [may challenge admissibility] on the ground that it is investigating or prosecuting the case [or has already done so]." *Id.* art. 19, para. 2(b). However, under Article 19(5), such a challenge must be made "at the earliest opportunity." *Id.* para. 5. The Rome Statute, therefore, provides for both *ex ante* (i.e., before completion of domestic proceedings) and *ex post* (i.e., after domestic proceedings) challenges to admissibility at the ICC. For Uganda, there is no basis for an *ex ante* challenge because there are no domestic proceedings regarding the LRA case. See *infra* Part VII for a discussion of whether Uganda can bring an admissibility challenge after it conducts domestic proceedings.

[44] *See infra* notes 157–67 and accompanying text (describing the possibility of deferral).

IV. LEGAL DEVELOPMENTS IN UGANDA

A. The Agreement on Accountability and Reconciliation and Its Annexure

As noted earlier, despite its referral to the ICC, the Ugandan government did not give up on the peace process.[45] In November 2004, the government announced a unilateral ceasefire and invited the LRA to negotiate peace.[46] However, the talks collapsed the following month.[47] Fresh talks opened in July 2006 and led to the successful negotiation of all agenda items,[48] yet the terms have not resulted in a final peace deal. Given the relative success of the peace talks, some have suggested that the only seeming obstacles to a peace deal are the ICC warrants.[49] While this suggestion is hard to substantiate, considering the years of hostilities and the atmosphere of mutual suspicion between the Parties, the fact remains that the LRA has conditioned its signature on a withdrawal of the arrest warrants.

The apparent chilling effect of the ICC arrest warrants on the peace process has prompted calls for the ICC to disengage from Uganda and for the government to seek alternative accountability options at the national level.[50] A wide array of domestic constituencies, including members of Parliament from Northern Uganda,[51] religious and community leaders,[52] civil society

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[45] *See supra* notes 21–23 and accompanying text (describing the peace process and providing Uganda's rationale).

[46] HEIDI ROSE & IRENE SATTARZADEH, LIU INST. FOR GLOBAL ISSUES, NORTHERN UGANDA: HUMAN SECURITY UPDATE 5 (2005), *available at* http://www.ligi.ubc.ca/sites/liu/files/Publications/HSR-Northern_Uganda.pdf; Apuuli, *supra* note 2, at 183.

[47] ROSE & SATTARZADEH, *supra* note 46, at 5; Apuuli, *supra* note 2, at 183.

[48] *Uganda Begins Ceasefire with LRA*, BBC (Aug. 29, 2006), http://news.bbc.co.uk/2/hi/5293630.stml; *see also* Apuuli, *supra* note 4, at 804 (listing the five agenda items agreed upon: "cessation of hostilities, comprehensive solutions to the conflict, accountability and reconciliation, formal cease-fire, and disarmament, demobilization and reintegration").

[49] Apuuli, *supra* note 4, at 804–05. Reportedly, Vincent Otti, Deputy Leader of the LRA, stated:

> [T]he rebels [would never] sign any peace deal until the noose around their necks is loosened by [the] withdrawal of the arrest warrants . . . . [T]he ICC is the greatest obstacle . . . . Unless the warrants are withdrawn [the rebels] shall not leave for anywhere. . . . [O]n behalf of the LRA, I want to state that I will not sign any peace agreement in Juba which sends me to prison. I can only sign an agreement that brings peace, not one that leads me to the ICC.

Id. (citations omitted).

[50] Apuuli, *supra* note 2, at 184–85.

[51] Apuuli, *supra* note 4, at 805.

[52] H. Abigail Moy, Recent Development, *The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity*, 19 HARV. HUM. RTS. J. 267, 270 (2006) (noting, for example, that

organizations,[53] and government officials[54] have expressed concern and opposition to the ICC process. These groups advocate the adoption of a combination of criminal proceedings and traditional justice approaches at the national level to deal with the LRA's war-related crimes.[55] It must be emphasized that these domestic voices do not call for impunity for the LRA; rather, being mindful of the current impasse over the peace process, they seek alternative accountability mechanisms that could contribute to the realization of both peace and justice.

The groundswell of popular opinion for domestic accountability instead of ICC-based trials for the LRA provides both the context and explanation for the provisions of the Agreement on Accountability and Reconciliation (the Agreement)[56] and the Annexure to the Agreement on Accountability and Reconciliation (the Annexure).[57] The Agreement expresses commitment to the principle of complementarity and is premised upon the twin objectives of accountability and reconciliation through "national legal arrangements."[58] It calls for both formal justice (criminal trials) and alternative justice mechanisms,[59] especially traditional practices such as *Mato Oput*, *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc*, *Tonu ci Koka*, and *Okukaraba*.[60] The Agreement is unclear about the category of perpetrators who will face formal, as opposed to traditional, justice, but it provides that the formal

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"Archbishop Odama of the Gulu Catholic Archdiocese [indicated that] '[t]his is like a blow to the peace process. The process of confidence-building has been moving well, but now the LRA will look at whoever gets in contact with them as an agent of the ICC.' " (citation omitted)); *see also* Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT'L L. 209, 217 (2008) (noting opposition to ICC involvement by the Acholi Religious Leaders Peace Initiative).

[53] Apuuli, *supra* note 2, at 180.

[54] Moy, *supra* note 52, at 270 (noting that Justice Peter Onega, the Chairman of Uganda's Amnesty Commission, believes that the ICC warrants may have thwarted reconciliation efforts by driving away rebels who might have been disposed to accept the terms of the government amnesty).

[55] Keller, *supra* note 52, at 217–18.

[56] Agreement, *supra* note 6.

[57] Annexure, *supra* note 6.

[58] Agreement, *supra* note 6, pmbl., cl. 2.1.

[59] *Id.* cl. 3.1 (calling for the promotion of "[t]raditional justice mechanisms . . . practiced in the communities affected by the conflict . . . as a central part of the framework for accountability and reconciliation").

[60] *Id.*; Annexure, *supra* note 6, cl. 21. All of these traditional justice approaches place emphasis on admission, forgiveness, compensation, and reconciliation, rather than punishment. *See, e.g.*, Kimberly Hanlon, Comment, *Peace or Justice: Now That Peace is Being Negotiated in Uganda, Will the ICC Still Pursue Justice?*, 14 TULSA J. COMP. & INT'L L. 295, 306 (2007) (" '[M]ato oput' . . . requires that the perpetrator of the crime admit wrongdoing to the victim, ask forgiveness, and pay compensation.").

justice mechanisms shall apply to perpetrators of "serious crimes or human rights violations."[61] It also states that the formal courts shall have jurisdiction over persons who "bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes."[62] These provisions may suggest Uganda's awareness of the need for perpetrators of serious international crimes, or those holding particular positions of leadership such that they are *presumed* to bear the greatest responsibility for serious violations, to face criminal prosecution rather than other forms of accountability. However, the Agreement does not state this explicitly.

Therefore, it remains to be seen how Ugandan prosecutors and judges will interpret these provisions. One would hope that these requirements are meant to reflect the international legal standards found in the Statutes of similar war crimes courts, including the Special Court for Sierra Leone's "those bear[ing] the greatest responsibility,"[63] or the Cambodia Court's "those who [are] most responsible"[64] for the perpetration of serious international crimes. If those interpretations are adopted, it is likely that because of the positions they held and the influenced they exercised, Joseph Kony and the LRA leadership would have to face formal criminal proceedings before the Ugandan courts, rather than traditional justice.

However, the legal situation remains unclear, and Uganda missed the opportunity to settle the division of labor between the formal and traditional justice mechanisms when it concluded the 2008 Annexure.[65] In fact, the Annexure seems to introduce further confusion by providing that "serious crimes" will be tried by "the special Division of the High Court; traditional justice mechanisms; and any other alternative justice mechanism established under the [2007] Agreement."[66] Neither the Agreement nor the Annexure

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[61] Agreement, *supra* note 6, cl. 4.1.

[62] *Id.* cl. 6.1.

[63] Statute of the Special Court for Sierra Leone, art. 1, Jan. 16, 2002, 2178 U.N.T.S. 145. The Special Court for Sierra Leone is an international criminal court established by an agreement between the United Nations and the government of Sierra Leone to try perpetrators of serious international crimes during Sierra Leone's civil war in the 1990s. For the Special Court's constitutive instrument, see Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137.

[64] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 1 (2002) (amended 2004).

[65] Keller, *supra* note 52, at 219 (noting that the Annexure "raises as many questions as it answers regarding the exact shape of the alternative justice measures").

[66] Annexure, *supra* note 6, cl. 23.

defines "serious crimes," but both consistently refer to formal and traditional justice processes as ways of securing accountability for the crimes committed during the conflict.[67] This failure to clearly limit accountability for serious international crimes to formal (criminal), as opposed to traditional justice mechanisms, is perhaps one of the weakest links in Uganda's attempt to construct a national accountability system for the LRA's crimes. The Agreement and Annexure, at best remain ambiguous on the question of a domestic accountability forum for serious crimes allegedly committed by the LRA.

In 2009, the ICC Pre-Trial Chamber considered the effect of the Agreement and Annexure on the admissibility of the LRA case.[68] The ICC invited observations from the ICC Prosecutor, the defense counsel, Uganda, and the victims (or their representatives),[69] and received amici curiae briefs on the issue of admissibility.[70] In his submissions, the ICC Prosecutor told the Court that the case remained admissible because there were no national proceedings in Uganda and noted that the question of admissibility was determined neither by ongoing peace negotiations nor the adoption of the Agreement and Annexure.[71] Similarly, Uganda submitted that the case was admissible because the domestic legal processes provided for in the Agreement and Annexure will only come into force when the LRA signs a comprehensive peace agreement.[72] Since the LRA had not signed any such peace deal, Uganda held the view that the Agreement and Annexure had "no legal force."[73]

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[67] Agreement, *supra* note 6, cl. 4.1 ("Formal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes . . . ."); *id.* cl. 3.1 (referring to "[t]raditional justice mechanisms . . . as a central part of the framework for accountability and reconciliation"); Annexure, *supra* note 6, cl. 7 ("A special division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict."); *id.* cl. 19 ("Traditional justice shall form a central part of the alternative justice and reconciliation framework identified in the [2007] Agreement.").

[68] Kony Decision on Admissibility, *supra* note 30, para. 2.

[69] Under the Rome Statute, "where the personal interests of . . . victims are affected," the ICC may, at any stage of the proceedings it deems appropriate, hear the views of victims. Rome Statute, *supra* note 3, art. 68, para. 3. Such views may be presented by the "legal representatives of the victims," in a manner that is not prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial. *Id.*

[70] *Id.* paras. 1–2.

[71] *Id.* para. 5.

[72] *Id.* para. 8.

[73] *Id.*

The Pre-Trial Chamber found that the case was admissible despite the existence of the Agreement and Annexure.[74] In doing so, the Chamber clarified that pursuant to Article 17 of the Rome Statute, "once the jurisdiction of the Court is triggered, it is for the [Chamber] and not for any national judicial authorities . . . to make a binding determination on the admissibility of a given case."[75] This pronouncement removes all doubt about Uganda's perceived power or ability to withdraw its referral. Simply stated, the above jurisprudence shows that ICC law does not permit such withdrawals. It was necessary for the Chamber to address and clarify this issue of Uganda's ability to withdraw the referral, because Uganda had made ambiguous submissions regarding the relationship between the ICC and the Special Division of the High Court of Uganda, which was established under Article 7 of the Annexure to try persons alleged to have committed "serious crimes" during the conflict.[76] In addition, the Chamber stated, *obiter dictum*, that complementarity is the "cornerstone of the [Rome] Statute" and that it is the principle that reconciles "the States' persisting duty to exercise jurisdiction over international crimes with the establishment of [the ICC with jurisdiction] over the same crimes."[77] It added that "admissibility is the criterion which enables the determination, in respect of a given case, whether it is for a national jurisdiction or the [ICC] to proceed."[78] Furthermore, the Pre-Trial Chamber cited an earlier Pre-Trial decision to the effect that in order for a case in which national proceedings had commenced to be inadmissible before the ICC, the "national proceedings must encompass both the person and the conduct which is the subject of the case before the [ICC]."[79]

On the specific question of the admissibility of the LRA case, the Pre-Trial Chamber noted that at the time of its decision, various institutional and

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[74] *Id.* paras. 52–53.

[75] *Id.* para. 45.

[76] Annexure, *supra* note 6, art. 7. In response to the Pre-Trial Chamber's request for responses on the admissibility of the case, Uganda had submitted, *inter alia*, that the Special Division of the High Court, "is not meant to supplant the work of the [ICC] and accordingly, those individuals who were indicted by the [ICC] will have to be brought before the special division of the High Court for trial." *See* Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05-286-Anx2, Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest (Mar. 27, 2008), http://www.icc-cpi.int/iccdocs/doc/doc461285.pdf.

[77] Kony Decision on Admissibility, *supra* note 30, para. 34.

[78] *Id.*

[79] *Id.* para. 17 (citing Prosecutor v. Thomas Lubanga Dyilo and Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-118, Decision on the Admissibility of the Case, paras. 29–41).

legal developments were taking place in Uganda.[80] However, since those developments could not be qualified as domestic proceedings, they could not bar admissibility.[81] The Pre-Trial Chamber added that the Rome Statute "does not rule out multiple determinations of admissibility,"[82] and, therefore, it may be possible for Uganda or any of the parties to bring a future admissibility challenge on the ground that new facts or circumstances, including domestic proceedings, had arisen in Uganda.[83]

B. The International Criminal Court Act

In March 2010, the Ugandan Parliament passed the International Criminal Court Act (ICC Act).[84] The ICC Act received presidential assent on May 25, 2010 and entered into force a month later.[85] Uganda's ICC Act provides, *inter alia*, for the trial and "punishment of genocide, crimes against humanity and war crimes"; Uganda's cooperation with the ICC in the investigation, arrest, detention, and surrender of persons wanted or convicted by the ICC; ICC trials to be held in Uganda; and the enforcement of sentences imposed by the ICC.[86] The ICC Act also grants privileges and immunities necessary for the ICC's work in Uganda.[87]

The ICC Act makes the provisions of the Rome Statute applicable to Ugandan national law.[88] It allows Uganda to undertake the legal steps necessary domestically to implement its Rome Statute obligations regarding the investigation, and the arrest, transfer, prosecution, and punishment of persons before the ICC.[89] As far as determining a forum choice for the LRA trial, one consequence of the ICC Act would be to require Uganda to hand over the LRA leadership to the ICC Prosecutor.[90] However, the trial

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[80] *Id.* paras. 47–48.
[81] *Id.* paras. 51–52.
[82] *Id.* para. 25.
[83] *Id.* paras. 25–29.
[84] MICHAEL OTIM & MARIEKE WIERDA, INT'L CTR. FOR TRANSITIONAL JUSTICE, UGANDA: IMPACT OF THE ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT 3 (2010), *available at* http://www.ictj.org/sites/default/files/ICTJ-Uganda-Impact-ICC-2010-English.pdf.
[85] International Criminal Court Act (2010) (Uganda), *available at* http://www.ucicc.org/documents/Legal/ICC%20Act%202010.pdf.
[86] *Id.* § 2.
[87] *Id.* § 101.
[88] *Id.* § 2(a).
[89] *Id.* § 20(1)(a); *see generally id.* pts. III–IV (providing for various forms of cooperation on the part of the government of Uganda in furtherance of the ICC's work in the country).
[90] *Id.* § 26.

following such transfer could take place either in Kampala or at The Hague.[91]

On the other hand, as discussed above, the Agreement and Annexure place emphasis on domestic processes of accountability by creating a Special Division of the High Court of Uganda to try war-related crimes and traditional justice processes for certain categories of perpetrators.[92] The differences in the two criminal justice regimes, however, become less significant when one takes a long-term view of criminal accountability for serious international crimes in Uganda. From that perspective, it is clear that the ICC Act is *lex generalis*; its object is to govern relationships, writ large, between Uganda and the ICC. The Agreement and Annexure, on the other hand, are *lex specialis*; they deal with the unique legal and political challenges posed by the LRA case. In the long run, then, the ICC Act will likely supplant the regime under the Agreement and Annexure, especially after the trial of the LRA leadership.

Regarding traditional justice, the various customary mechanisms recognized by the Agreement and Annexure have formed an important fabric of local culture and society in Northern Uganda over many generations. From that perspective, the provisions of the Agreement and Annexure dealing with traditional justice have an inherently legitimate character as instruments of dispute settlement, reconciliation, and social harmony at the local level.[93] Whichever way one looks at it, traditional justice must form part of the panoply of accountability options with which to address the crimes committed in Uganda. However, given traditional justice's emphasis on forgiveness, reconciliation, and compensation, rather than punishment,[94] and considering the serious crimes for which the LRA have been accused, there is perhaps a need to selectively combine traditional justice approaches with other accountability options, including national trials for senior LRA leaders, and truth and reconciliation commissions[95] for lower-level

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[91] *Id.* § 91 (providing for sittings of the ICC to take place in Uganda).

[92] *See supra* notes 58–59, 66–67 and accompanying text.

[93] *See* Hanlon, *supra* note 60, at 315–16 ("Traditional justice in Uganda balances 'the need to punish individuals for their crimes . . . against the need to restore wholeness to the community.' . . . Traditional justice calls for restoring harmony in the community." (citation omitted)).

[94] *See, e.g.*, *id.* at 306 (describing the *mato oput* process).

[95] Truth and Reconciliation Commissions (TRCs) are investigative proceedings where alleged perpetrators of human rights abuses and other violations testify openly about and admit their crimes, usually in the presence of victims, and ask for forgiveness. In exchange for their admissions and plea for forgiveness, perpetrators could be granted amnesty from prosecution, or be ordered to pay or perform other kinds of reparation. Unlike criminal trials

perpetrators. Combining traditional justice with other accountability options, has the added merit of promoting both accountability and reconciliation as overarching objectives of the government and people of Uganda.

The first option would be for Uganda to adopt a parallel accountability process, whereby Kony and other LRA leaders for whom arrest warrants have been issued by the ICC will be tried at the Special Division of the High Court for crimes against humanity and war crimes based on internationally recognized standards.[96] If convicted, these LRA leaders must receive prison terms consistent with the sanctions regime under the Rome Statute. Alongside these trials, lower-level perpetrators who fall outside of the leadership category, or whose crimes are not particularly grave, could be subjected to traditional justice processes. This option has the merit of preserving the interests of those who advocate for both peace and justice within Uganda's domestic judiciary.[97] Indeed, the idea of parallel accountability processes is built into several sections of the Agreement. For example, the Agreement makes provision for the utilization "of formal and non formal institutions and measures for ensuring justice and reconciliation with respect to [crimes committed during] the conflict."[98] Similarly, it calls for an "overarching justice framework" under which both formal criminal justice and traditional justice mechanisms would play a role in the processes of accountability and reconciliation.[99]

The second option is to hold national trials for the LRA leadership and subject the lower-level perpetrators, such as former child soldiers, who might have committed crimes against their own communities or families, to a truth

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which are meant to punish perpetrators, the overall objectives of TRCs are to promote peace, reconciliation and healing in post-conflict societies, and to maintain a historical record of past wrongdoing. Recent examples in Africa include the TRC established to investigate Apartheid-era crimes in South Africa, and the TRC established in Sierra Leone after a decade-long civil war in the 1990s. For details on these two TRCs see TRUTH & RECONCILIATION COMM'N, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (2003), *available at* http://www.info.gov.za; SIERRA LEONE TRUTH & RECONCILIATION COMM'N, WITNESS TO TRUTH (2004), *available at* http://www.Sierra-Leone.org/TRCDocuments.html.

[96] *See, e.g.*, Agreement, *supra* note 6, cl. 6.1 (providing in relevant part that "individuals who . . . bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes" shall be tried before "[f]ormal courts provided for under the Constitution").

[97] Okello, *supra* note 12, at 2 ("On the other hand, the rationale for a 'peace first, justice later' position is quite simple: It is a matter of sequencing. *And, sequencing should be distinguished from prioritization*. . . . Whichever way you look at it, trying to ensure that the environment is conducive for a comprehensive pursuit of justice . . . is definitive proof that you want real justice to be done.").

[98] Agreement, *supra* note 6, cl. 2.1.

[99] *Id.* cl. 5.2

and reconciliation commission.[100] This approach would be particularly suitable in a situation like Uganda where the line between perpetrators and victims is often blurred.[101]

The third option is for those ostensibly bearing the greatest responsibility for crimes committed in Northern Uganda, including Kony and his rebel leadership, to be tried at the ICC.[102] Alongside these international trials, a combination of domestic accountability processes, including national trials at the Special Division of the High Court, traditional justice, and reconciliation mechanisms could be put in place and targeted to other alleged perpetrators depending upon the nature of the allegations against them. This would be consistent with the ICC Prosecutor's policy,[103] as well as the expectations of international human rights activists for accountability based on Uganda's self-referral in 2003.[104] As Human Rights Watch, a nonprofit and nongovernmental organization, has argued, the search for a durable peace in

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[100] *Id.* cl. 12(iv) (stating that "children are not subjected to criminal justice proceedings, but may participate, as appropriate, in reconciliation processes"). Similarly, clauses 10 and 11 of the Agreement call for a "gender-sensitive approach," that the "special needs of women and girls" are addressed, and that their "dignity, privacy and security" are protected in the processes of justice and reconciliation envisaged under the Agreement. *Id.* cls. 10, 11(i), 11(iii).

[101] For discussions on the forceful recruitment or abduction of children into the LRA, see Apuuli, *supra* note 2, at 183; Ssenyonjo, *supra* note 2, at 407; Hanlon, *supra* note 60, at 301.

[102] Kony Decision on Admissibility, *supra* note 30, para. 37 (Mar. 10, 2009) (quoting the statement by the Solicitor-General of Uganda that the ICC was " 'the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility for the crimes [committed in Uganda]' " (citation omitted)).

[103] OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, POLICY PAPER ON THE INTERESTS OF JUSTICE 7 (2007) [hereinafter POLICY PAPER], *available at* http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422bb23528/143640/ICCOTPInterestsOfJustice.pdf ("The OTP has clearly stated its policy of focusing its investigations on those bearing the greatest degree of responsibility. Factors to be taken into account include the alleged status or hierarchical level of the accused or implication in particularly serious or notorious crimes. That is, the significance of the role of the accused in the overall commission of crimes and the degree of the accused's involvement (actual commission, ordering, indirect participation)."); *see also Uganda: Interview with ICC Prosecutor Luis Moreno-Ocampo*, INTEGRATED REG'L INFO. NETWORKS (June 9, 2005), http://www.irinnews.org/report.aspx?reportid=54856 (noting the Prosecutor's acknowledgment that investigation and prosecutions will focus on those limited number of individuals who bear the greatest responsibility for committing the most serious crimes within the jurisdiction of the court).

[104] *See* Elise Keppler & Richard Dicker, *Trading Justice for Peace in Uganda Won't Work*, UGANDA DAILY MONITOR (May 3, 2007), http://www.hrw.org/news/2007/05/02/trading-justice-peace-uganda-won-t-work ("[T]o achieve . . . peace, the warring parties and the mediators cannot bargain away prosecution of the LRA leaders who have been charged with grave crimes. Simply put, a solution that avoids meaningful justice will undercut the prospects for a durable peace.").

Uganda must entail "both a peace agreement and fair, credible prosecutions of those responsible for the most serious crimes committed . . . during the conflict."[105]

Given the context of ongoing conflict in the country, the differing views of advocates of peace versus advocates of justice, the tensions between traditional and Western forms of justice and between domestic and international systems, as well as the need to consider alternative forms of accountability like truth commissions for certain categories of perpetrators, Uganda cannot afford to shut out any of the accountability options. Arriving at the right balance with respect to these options would be a complex, time-consuming exercise. In order to succeed, Uganda and the ICC must align their priorities and recognize that neither the international call for justice against the LRA nor the domestic need for a peaceful settlement of the conflict, can be easily shrugged off as irrelevant or insignificant.

V. THE CASE FOR UGANDA-BASED TRIALS

In light of the current impasse over the final peace agreement and the position of the ICC Pre-Trial Chamber that the LRA case remains admissible before the ICC, are there good reasons to suggest that Uganda-based trials hold the best promise for achieving both peace and justice? The inability thus far of the parties to reach a final peace settlement means that war-ravaged Ugandans continue to face an unsettling political situation. Similarly, the theoretical existence of various accountability options, when viewed in light of Uganda's inability to arrest Kony, implies that the ICC warrants have become the proverbial "Sword of Damocles" hanging not only over the head of the LRA, but also over the entire peace process. Unfortunately, the victim population of Northern Uganda who helplessly continue to suffer the effects of over two decades of inexplicable violence is trapped between a group of brutal rebels and the political elite. This is particularly true of the Acholi ethnic group, whose sentiments remain understandably divided over the issue.[106] It is Acholi children who, in the main, have been forcibly abducted and turned into child soldiers by the LRA.[107] Therefore, while many Acholi would like to see some form of

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[105] *House of Commons Select Committee on International Development Inquiry "Prospects for Sustainable Peace in Uganda,"* HUM. RTS. WATCH (July 17, 2007), http://www.hrw.org/news/2007/07/16/house-commons-select-committee-international-development-inquiry-prospects-sustainab [hereinafter *House of Commons*].

[106] Keller, *supra* note 52, at 225.

[107] Ssenyonjo, *supra* note 2, at 411–12.

accountability for Kony and his henchmen, they would also want to see a peaceful resolution of the conflict so that their sons and daughters can return home.[108] This is just one illustration of the complex interplay of interests and factors that require careful consideration in dealing with the LRA case.

There is a strong body of public opinion in Uganda that supports dropping the ICC warrants and the use of alternative accountability mechanisms for the LRA's crimes.[109] In other words, Ugandans are not advocating impunity for the rebel leadership; however, as the people most directly affected by the conflict, they prefer that the quest for justice be appropriately timed and carried out in a manner that does not defeat the prospects for peace.[110] It has been reported that the majority of Members of Parliament from Northern Uganda hold the view that the ICC warrants should be dropped in favor of traditional justice mechanisms.[111] Similarly, leading figures such as former Minister in Museveni's government and longtime peace negotiator Betty Bigombe,[112] the head of the Uganda Amnesty Commission,[113] and religious leaders from Northern Uganda, including the Acholi Religious Leaders Peace Initiative,[114] have all expressed concern that the arrest warrants could adversely affect chances of a negotiated settlement and dissuade the rebels from responding to a final peace initiative. Moreover, traditional Acholi leaders, from whose community the LRA draws most of its members, but who also constitute the largest population of victims of the LRA's crimes,[115] have made no secret of their preference for traditional justice and reconciliation over the ICC process.[116] Rwot Onen David Acana II, Paramount Chief of the Acholi, stated " 'The best way to resolve the . . . war in our region is through poro lok ki mato oput (peace talks and reconciliation) as it's in the Acholi culture . . . . [T]he Acholi do not buy their idea of taking [Kony] to court.' "[117] During his visit to Northern Uganda in

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[108] Keller, *supra* note 52, at 224.

[109] *See, e.g.*, Apuuli, *supra* note 2, at 184–85 (citing religious leaders, members of the Amnesty Commission, and local politicians as having expressed disapproval of the ICC's involvement in Uganda).

[110] *See* Okello, *supra* note 12, at 2 (calling for appropriate sequencing of peace and justice).

[111] Apuuli, *supra* note 4, at 805.

[112] Apuuli, *supra* note 2, at 185 (noting remarks by Bigombe that as a result of rushed nature of the ICC warrants "there is now no hope of getting the LRA commanders to surrender" (citation omitted)).

[113] Moy, *supra* note 52, at 270.

[114] Keller, *supra* note 52, at 217.

[115] Ssenyonjo, *supra* note 2, at 411–12.

[116] Goldstone, *supra* note 31, at 774.

[117] *Id.* (citation omitted). Scholar Alex Little explains consequences of favoring accountability over victim autonomy:

2006, then United Nations Under-Secretary-General for Humanitarian Affairs, Jan Egeland, noted that most stakeholders in the Ugandan peace process felt that the ICC warrants " 'should be dropped against the LRA leaders so that a peaceful conclusion to the talks can be reached.' "[118]

In addition, there are compelling criminal justice arguments in favor of national trials. It is uncontroverted that most of the LRA's crimes were committed in Uganda, the victims and perpetrators are Ugandan, and almost all of the potential witnesses and forensic evidence are to be found in Uganda. Both from the point of view of traditional international law[119] and the complementarity regime of the Rome Statute,[120] Uganda's jurisdiction to try the LRA is unquestionable. Moreover, investigations and trial management would be less cumbersome, more cost effective, and hopefully speedier if the trials were held in Uganda.

There are also inherent legitimacy gains in having Ugandan perpetrators of serious crimes face justice at the hands of fellow Ugandans, as well as in the presence of victims and families.[121] Ugandan investigators, prosecutors,

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> First, when victims oppose prosecution, their safety and that of the community might not be improved by a blanket policy that favors prosecution. . . . Second, prosecutors send mixed messages when they proceed with prosecution against victims' wishes. The constructive signal of accountability often is paired with destructive portrayals of uncooperative victims as weak, irrational, or helpless.

Alex Little, *Balancing Accountability and Victim Autonomy at the International Criminal Court*, 38 GEO. J. INT'L L. 363, 363–64 (2007). Little concludes that "although prosecution can impose significant costs on individual victims and victimized communities, this risk may be necessary to ensure that grave crimes never again are committed with impunity." *Id.* at 354. Clearly, Little favors aggressive prosecution on the basis of its deterrent potential. Unfortunately, as experience has shown, it is hard to prove empirically that aggressive prosecution always leads to deterrence. In the context of Uganda, the question is not so much whether to prosecute Kony and the LRA leaders, as much as *where* such prosecution should take place—within traditional society, in national courts, or at the ICC.

[118] Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT'L L. 107, 116 (2009) (citation omitted). Further, the Catholic archdiocese's Justice and Peace Commission of Gulu stated that " '[t]o start war crimes investigations for the sake of justice at a time when the war is not yet over, risks having, in the end, neither justice nor peace delivered.' " Arsanjani & Reisman, *supra* note 15, at 385 (citation omitted).

[119] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 300–07 (7th ed. 2008) (discussing the traditional bases for criminal jurisdiction recognized under international law).

[120] Rome Statute, *supra* note 3, pmbl., art. 1.

[121] *See* U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, para. 34, U.N. Doc. S/2004/616 (Aug. 23, 2004) ("While the international community is obliged to act directly for the protection of human rights and human security where conflict has eroded or frustrated the domestic rule of law, in the long term, no ad hoc, temporary or external measures can ever replace a

and judges must be presumed to have a better understanding of the historical and political context of the conflict.[122] The ability of victims and families to bear witness to, and participate in, proceedings against those who have so egregiously violated their most basic human rights could facilitate a better understanding of the justice process by victims and survivors and lead to their acceptance of the proceedings. As seen in other conflict situations, victims of large-scale atrocities such as those in Uganda, generally favor the idea that, given the scale and degree of the crimes committed against them, some form of justice, albeit an imperfect one, is preferable to no justice at all.[123]

From the point of view of deterrence, it has been argued that national trials for perpetrators of serious international crimes contribute more effectively to preventing the recurrence of similar crimes in the future. For example, in the context of Rwanda and Yugoslavia, at least one commentator has argued that the establishment and experience of the mixed international tribunals in Sierra Leone, East Timor, and Kosovo show "that justice delivered close to the affected societies in Rwanda or Former Yugoslavia is far more effective than in the remote confines of Arusha or The Hague."[124] Ideally, successful trials of the LRA in Uganda would not only contribute to deterrence, but also enhance prospects for national reconciliation upon which a sustainable peace can be built.[125] Finally, one cannot overstate the positive

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functioning national justice system.").

[122] *See, e.g.*, *id.* para. 16 ("Local consultation enables a better understanding of the dynamics of past conflict, patterns of discrimination and types of victims.").

[123] In the context of the ICTY, for example, Diane Orentlicher has found that, while many victims and survivors were not totally satisfied by the cost, speed, indictments issued, or sentences imposed by the ICTY, they also accept the idea that the justice administered by the ICTY, imperfect as it may be, is better than no justice at all. *See* DIANE F. ORENTLICHER, INT'L CTR. FOR TRANSITIONAL JUSTICE, THAT SOMEONE GUILTY BE PUNISHED: THE IMPACT OF THE ICTY IN BOSNIA 14 (2010).

[124] Jean-Marie Kamatali, *From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans*, 12 NEW ENG. J. INT'L & COMP. L. 89, 91 (2005).

[125] *House of Commons*, *supra* note 105 ("Prosecutions send the message . . . to would-be perpetrators, that no one is above the law. This can help consolidate respect for the rule of law and contribute to deterring future abuses, thereby helping to cement peace and stability."); *see also* Kamatali, *supra* note 124, at 91–92. Kamatali, former Dean of Law at the National University of Rwanda, argues,

> For the Rwandan community, on the sides of both the victim and the perpetrator, the justice and deterrence expected from the ICTR results not only from knowing that Akayesu, Kambanda or Bagosora . . . have been condemned. More importantly, it also results from witnessing the process through which they lost their positions of power, authority and harm.

Id. at 92.

effects of such trials on the rule of law in Uganda, as well as on the potential for capacity building of Uganda's legal institutions to deal with serious international crimes.

In order for Uganda to successfully undertake these prosecutions and stand any chance of meeting the inadmissibility requirements of the Rome Statute, it must first strengthen its national legal framework for the trial of serious international crimes. In its endeavor "to map out the contours of acceptable domestic proceedings,"[126] Uganda can learn useful lessons from the experience of the ICTR regarding the prosecutor's application to transfer cases for trial in Rwandan courts. These lessons are relevant because the ICTR, like other international justice institutions established to deal with grave atrocities, sets not only global, but also national standards of justice. In the words of one commentator, such institutions define "what domestic criminal justice should look like for adjudicating crimes against humanity, genocide, and war crimes."[127]

VI. LESSONS FROM THE ICTR EXPERIENCE

The ICTR Prosecutor's applications to refer cases to Rwanda for trial and Uganda's desire to try the LRA case in its national courts, both concern the application of the general principle of concurrent jurisdiction between national and international courts, although there are important legal and factual differences that must be taken into account.

First, as stated earlier, while the ICTR enjoys primacy over Rwanda regarding the trial of cases falling within the ICTR's jurisdiction, the ICC's jurisdiction only kicks in as a last resort when the inadmissibility conditions under Article 17 of the Rome Statute are satisfied.[128] In addition to the statutory distinction between primacy and complementarity,[129] a second distinction is the fact that at the time of ruling on the Prosecutor's referral

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[126] William W. Burke-White & Scott Kaplan, *Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation*, 7 J. INT'L CRIM. JUST. 257, 278 (2009).

[127] Blumenson, *supra* note 9, at 805.

[128] Rome Statute, *supra* note 3, art. 17.

[129] Under the Statute of the ICTR, the U.N Security Council has conferred on that Court the primary responsibility to investigate and prosecute genocide, war crimes and crimes against humanity falling within the jurisdiction of the Tribunal. For this reason, the Tribunal can ask national courts to defer to its jurisdiction. ICTR Statute, *supra* note 28, art. 8, paras. 1–2. On the other hand, the principle of complementarity under the Rome Statute, implies that the primary responsibility for investigating and prosecuting crimes within the ICC's jurisdiction, lies with States and the ICC can only take action where the national jurisdiction fails to investigate or prosecute. Rome Statute, *supra* note 3, pmbl., art. 1.

requests, the ICTR had most of the indictees in its custody.[130] It was, therefore, easier for the ICTR Judges to impose conditions on their transfer to national jurisdiction.[131] This situation stands in stark contrast to Uganda's twenty-year inability to arrest the LRA leadership.[132] While Uganda seems to want to sequence peace over justice, the ICC insists on implementing its statutory mandate of bringing to justice those allegedly bearing responsibility for serious international crimes. This provides a third important distinction with the Rwanda situation, where the war ended in 1994 and by the time the ICTR judges ruled on the Prosecutor's referral requests, both the national and international systems were singularly focused on bringing the perpetrators to justice.[133]

Despite these differences, however, the normative architecture that the ICTR judges established for the trial of serious international crimes at the domestic level could provide useful lessons for Uganda's emerging criminal justice system vis-à-vis the LRA trials. After all, like Rwanda, Uganda is another African country grappling with the effects of large-scale violence

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[130] President of the Int'l Criminal Tribunal for Rwanda, Letter dated Dec. 8, 2006 from the President of the Int'l Criminal Tribunal for Rwanda addressed to the President of the U.N. Sec. Council, paras. 3–5, U.N. Doc. S/2006/951 (Dec. 8, 2006) (informing the Security Council that, at the date of his report, trials involving 58 persons had either been completed or were in progress; 11 detainees were awaiting trial; and 18 indictees were at large).

[131] *See* Prosecutor v. Bagaragaza, Case No. ICTR-2005-86-R11*bis*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, para. 5 (May 19, 2006), http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Bagaragaza/decisions/190506.html [hereinafter Bagaragaza Trial Chamber Decision] (noting that the considerations for ruling on a motion for referral include "the jurisdiction, willingness and preparedness of the Referral State" and "the ability of the Referral State to conduct a fair trial").

[132] The government of Uganda's inability to arrest the LRA leadership or bring the war to an end is a well-known fact. Due to this inability, in October 2011, U.S. President Barack Obama authorized the deployment of about one hundred special force soldiers to help Ugandan and African Union troops track down Kony. The U.S. forces will not engage in combat, but will rather serve in an advisory and support role. *See* ALEXIS ARIEFF & LAUREN PLOCH, CONG. RESEARCH SERV., R42094, THE LORD'S RESISTANCE ARMY: THE UNITED STATES RESPONSE (2011).

[133] ICTR Statute, *supra* note 28, art. 8, para. 1. The Resolution notes, *inter alia*, that serious crimes, including genocide, war crimes, and crimes against humanity, had been committed in Rwanda and that this "constitute[s] a threat to international peace and security." *Id.* pmbl. Although Rwanda initially called for and supported the establishment of the ICTR to prosecute those allegedly responsible for the commission of these crimes, as a non-permanent member of the U.N. Security Council in 1994, the country ended up voting against the U.N.'s resolution due to disagreements over the seat of the ICTR and the non-applicability of the death penalty. *See, e.g.*, Parker Patterson, Comment, *Partial Justice: Successes and Failures of the International Criminal Tribunal for Rwanda in Ending Impunity for Violations of International Criminal Law*, 19 TUL. J. INT'L & COMP. L. 369, 372 (2010) (noting Rwanda's "objections regarding the structure, jurisdiction, and location of the tribunal").

within its borders. But, while neighboring Rwanda's attempt to ensure accountability for genocide and other serious violations of international law took place in a post-conflict setting, Uganda faces an ongoing conflict, and, given the equally important goal of securing a lasting peace in the country, the accountability process remains delicate. Yet, the internal nature of both conflicts, the quest for domestic rather than international accountability for grave crimes, debates about the maturity of their respective criminal justice systems to deal with wide-scale atrocities, and perceptions about victors' justice in both contexts, mean that Uganda can learn useful lessons from the Rwandan experience.

The cornerstone of the normative architecture for referral of cases from the ICTR to national jurisdiction is contained in Rule 11 *bis* of the ICTR Rules of Procedure and Evidence and the various decisions of the Trial and Appeals Chamber (Appeals Chamber) that interpret it.[134] As there is no question about Uganda's primary jurisdiction to try the LRA—save for the self-referral—this section focuses on the standards which the ICTR judges have, in their interpretation of Rule 11 *bis*, set for national proceedings to satisfy international legal standards.

A. Trials Must Be for International, Not Ordinary, Crimes

In dealing with the Prosecutor's first-ever Rule 11 *bis* request for referral to national jurisdiction in *Prosecutor v. Bagaragaza*, the ICTR Appeal Chamber held that the conduct for which the accused is charged, must constitute an international crime under the law of the referral state.[135] According to the Appeals Chamber, the ICTR's statutory authority permits referral only for prosecution as serious violations of international humanitarian law, not for prosecution as ordinary crimes.[136] Thus, the Appeals Chamber held, confirming the decision of the Trial Chamber, that Bagaragaza's case could not be referred to Norway.[137] The Appeals

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[134] Rule 11 *bis* provides that a referral can only be made to "a State: (i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) [which has] jurisdiction and [is] willing and adequately prepared to accept such a case." Int'l Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3.REV.1, r. 11*bis*(A) (June 29, 1995) (as amended Feb. 9, 2010), http://unictr.org/Portals/0/English/Legal/ROP/100209.pdf. In determining a request for referral, the Trial Chamber is required to consider whether "the accused will receive a fair trial . . . and that the death penalty will not be imposed or carried out." *Id.* r. 11*bis*(C).

[135] Bagaragaza Trial Chamber Decision, *supra* note 131, para. 16.

[136] *Id.*

[137] *Id.*

Chamber reasoned that, unlike in the ICTR where Bagaragaza would have been tried for genocide, the Norwegian penal code only permitted his trial for the ordinary crime of homicide.[138]

If the trials in Uganda are to meet international legal standards, including the inadmissibility requirements of the Rome Statute, the LRA leaders must be tried for serious international crimes, including crimes against humanity and war crimes as contained in the ICC warrants. In this regard, it is important to note that Uganda's recently passed ICC Act provides for the prosecution of serious international crimes.[139] However, in moving forward, Uganda must not only clarify the ambiguous term "serious crimes" under the Agreement and Annexure, but must reconcile that notion with the ICC Act which specifically provides for the trial of genocide, war crimes, and crimes against humanity.

B. Uganda Must Conduct Fair Trials

The ICTR jurisprudence under Rule 11 *bis* also provides useful guidance on relevant fair trial standards that must be adhered to when serious international crimes are prosecuted at the domestic level.[140] In addition to independent and impartial judges, the domestic legal framework must afford equality of arms to the prosecution and defense. The legal system must protect the rights of the accused during trial, including the right to call witnesses to testify in his or her defense, to secure the assistance of counsel (if necessary, at the expense of the State), and not to be compelled to testify against himself or herself or to confess guilt.[141]

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[138] *Id.* paras. 14–15, 17. *But see* Prosecutor v. Hategekimana, Case No. ICTR-00-55B-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11*bis*, para. 12 (Dec. 4, 2008), http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Hategekimana/decisions/081204.pdf [hereinafter Hategekimana Appellate Chamber Decision] (holding that this requirement is limited to the substantive offence charged, and not a mode of liability).

[139] International Criminal Court Act, *supra* note 85, § 2 ("The purpose of this act is . . . (c) to make further provision in Uganda's law for the punishment of the international crimes of genocide, crimes against humanity and war crimes.").

[140] *See Uganda: Any Alternative to the ICC Should Meet Key Benchmarks*, HUM. RTS. WATCH (May 31, 2007), http://www.hrw.org/news/2007/05/30/Uganda-any-alternative-icc-should-meet-key-benchmarks (arguing that national alternatives to the ICC must entail "credible, independent and impartial investigation and prosecution; rigorous adherence in principle and practice to international fair trial standards; and penalties that are appropriate and reflect the gravity of the crimes").

[141] *See, e.g.*, Rome Statute, *supra* note 3, art. 67 (detailing the rights of the accused under the Rome Statute); ICTR Statute, *supra* note 28, art. 20 (detailing the rights of the accused under the ICTR Statute).

In this context, the jurisprudence of the ICTR holds that the accused must be able "to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."[142] Further, the ICTR holds that trials in Rwanda would be unfair where witnesses living in that country were found to be unwilling to testify for the defense due to fear that they may face serious consequences, including threats, harassment, torture, arrest, or being killed.[143] Similarly, the ICTR case law holds that Rwanda-based trials would be unfair in circumstances where the majority of defense witnesses live outside the country and would be afraid to testify in Rwanda.[144]

Although Rwanda and the ICTR Prosecutor both argued that the domestic legal framework provided alternative facilities, such as video-link technology, for the testimony of witnesses who are either unwilling or unable to travel to Rwanda, the judges were unconvinced that the existence of such facilities would provide a sufficient remedy.[145] The judges recalled their experience with cases tried at the ICTR, where a large majority of defense

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[142] ICTR Statute, *supra* note 28, art. 20, para. 4(e); Hategekimana Appellate Chamber Decision, *supra* note 138, para. 26; Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*, para. 31 (Oct. 30, 2008), http://unictr.org/Portals/0/Case%5CEnglish%5CKanyarukiga%5Cdicisions%5C081030.pdf [hereinafter Kanyarukiga Appellate Chamber Decision]; Prosecutor v. Munyakazi, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*, para. 40 (Oct. 8, 2008), http://www.unictr.org/Portals/0/Case/English/Munyakazi/decisions/081008.pdf [hereinafter Munyakazi Appellate Chamber Decision].

[143] Hategekimana Appellate Chamber Decision, *supra* note 138, para. 22; Munyakazi Appellate Chamber Decision, *supra* note 142, para. 45; Kanyarukiga Appellate Chamber Decision, *supra* note 142, para. 34; Prosecutor v. Gatete, Case No. ICTR-2000-61-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, para. 72 (Nov. 17, 2008), http://www.unictr.org/Portals/0/Case/English/Gatete/decisions/081117.pdf [hereinafter Gatete Trial Chamber Decision].

[144] Gatete Trial Chamber Decision, *supra* note 143, paras. 65–72; Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, paras. 76–77 (June 6, 2008), http://www.unictr.org/Portals/0/Case/English/Kanyarukiga/decisions/080606.pdf [hereinafter Kanyarukiga Trial Chamber Decision]; Prosecutor v. Hategekimana, Case No. ICTR-0055B-R11*bis*, Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda, para. 71 (June 19, 2008), http://www.unictr.org/Portals/0/Case/English/Hategekimana/decisions/080619.pdf [hereinafter Hategekimana Trial Chamber Decision]; Prosecutor v. Munyakazi, Case No. ICTR-97-36-R11*bis*, Decision on Prosecutor's Request for Referral of Case to the Republic of Rwanda, paras. 63–66 (May 28, 2008), http://www.unictr.org/Portals/0/Case/English/Munyakazi/decisions/080528.pdf [hereinafter Munyakazi Trial Chamber Decision].

[145] Hategekimana Trial Chamber Decision, *supra* note 144, paras. 70–71; Kanyarukiga Trial Chamber Decision, *supra* note 144, paras. 78–79; Munyakazi Trial Chamber Decision, *supra* note 144, paras. 65–66.

witnesses travelled to testify in Arusha from places outside Rwanda, and ruled that the utilization of video-link technology could result in a situation where the majority of prosecution witnesses are heard directly by the Chamber, while most defense evidence is only heard indirectly, through video-link testimony.[146] The judges held that this imbalance would violate the principle of equality of arms and render the trial unfair since the rights of the accused to obtain the attendance of witnesses and to examine witnesses under the same conditions as witnesses for the prosecution would be violated.[147]

In addition, it is important that defense teams be able to work in a conducive environment that enables them to carry out investigations, access documents, and secure witnesses for trial.[148] In the Kanyarukiga case, the ICTR Appeals Chamber held that difficulties experienced by defense counsel in obtaining documents and meeting potential witnesses, especially detainees in Rwanda, showed that "working conditions for the Defence may be difficult" and this could affect the fair trial rights of the accused.[149]

Uganda must also establish an independent and impartial witness protection program, which is accessible by both parties. In this respect, the ICTR case law holds that where a witness protection service was located in the office of Rwanda's Prosecutor General and complaints of witness harassment must be reported to the police, potential defense witnesses may be afraid to avail themselves of its services, thereby undermining the prospects of a fair trial.[150]

C. There Must Be an Adequate Penalty Structure

The ICTR case law also lays down that ambiguity regarding the penalty structure governing serious international crimes, may render a domestic legal framework inadequate to try such offenses. In the Bagaragaza case, one of the reasons implicit in the Trial Chamber's denial of the Prosecutor's referral request to Norway was that Bagaragaza would only face a maximum term of twenty-one years imprisonment if tried as an accessory to homicide or for

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[146] Hategekimana Appellate Chamber Decision, *supra* note 138, para. 26; Gatete Trial Chamber Decision, *supra* note 143, paras. 70–72; Kanyarukiga Appellate Chamber Decision, *supra* note 142, para. 33; Munyakazi Appellate Chamber Decision, *supra* note 142, para. 42.

[147] Hategekimana Appellate Chamber Decision, *supra* note 138, para. 26; Gatete Trial Chamber Decision, *supra* note 143, para. 72; Kanyarukiga Appellate Chamber Decision, *supra* note 142, para. 34; Munyakazi Appellate Chamber Decision, *supra* note 142, para. 43.

[148] Kanyarukiga Appellate Chamber Decision, *supra* note 142, para. 21.

[149] *Id.* paras. 19, 21.

[150] *Id.* paras. 26–27.

negligent homicide under Norwegian law, rather than life imprisonment following a genocide trial at the ICTR.[151] Similarly, in the Munyakazi and Kanyarukiga cases, the Trial and Appeals Chambers both held that ambiguity regarding which one (of two) penalty regimes in Rwandan law would govern cases transferred under Rule 11 *bis* raised the possibility that life imprisonment in isolation could be imposed.[152] The judges held that, because there was no evidence that the minimum safeguards against such an exceptional penalty were available under Rwandan law, they could not order referral to Rwandan courts.[153] Indeed, this issue was of such fundamental concern to the judges that, although Rwanda had passed legislation excluding life imprisonment in solitary confinement from cases referred from the ICTR, the judges still denied the Prosecutor's subsequent request to refer Hategekimana's case on the ground that the amendment had not yet entered into force at the time of the Appeal Chamber's Decision.[154]

The relevance of this holding to the situation in Uganda is self-evident. If Uganda applies the provisions of the Agreement calling for a "regime of alternative penalties and sanctions"[155] and proceeds, after trial, to place the LRA leaders under sanctions such as house arrest, apologies, or requires them merely to pay compensation under a traditional justice process, it is unlikely that the domestic trials will meet international standards or, indeed, the inadmissibility tests under the Rome Statute.[156]

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[151] Bagaragaza Trial Chamber Decision, *supra* note 131, para. 9.

[152] Munyakazi Appellate Chamber Decision, *supra* note 142, paras. 19–21; Kanyarukiga Appellate Chamber Decision, *supra* note 142, paras. 16–17. The ambiguity arose out of whether the punishment regime to be applied to referral cases was the one under a Rwandan law providing for a maximum sentence of life imprisonment (Transfer Law), or the Rwandan law providing for the possibility of life imprisonment with special provisions (i.e., solitary confinement) for certain categories of offenders, including those convicted of genocide (Abolition of Death Penalty Law). Munyakazi Appellate Chamber Decision, *supra* note 142, paras. 9–10. The Appeals Chamber held that there were at least three alternative interpretations of the sanctions regime under Rwandan law including that: (1) since the Abolition of Death Penalty law post-dated the Transfer Law, it was *lex posterior* and should therefore be applicable; (2) the Transfer Law was *lex specialis* and its provisions cannot be displaced by a general law; and (3) there was in fact no inconsistency between the laws and that the Abolition of Death Penalty Law merely elaborated the sentencing structure under the Transfer Law. *Id.* paras. 16–17. The Appeals Chamber held that it fell within the jurisdiction of the Rwandan courts to determine which of these regimes applied but that the legal ambiguity was sufficient to deny the referral request. *Id*. paras. 19–21.

[153] Munyakazi Appellate Chamber Decision, *supra* note 142, paras. 18, 20.

[154] Hategekimana Appellate Chamber Decision, *supra* note 138, paras. 37–38.

[155] Agreement, *supra* note 6, cl. 6.3.

[156] Burke-White & Kaplan, *supra* note 126, at 273; *see also House of Commons*, *supra* note 105 (arguing that imprisonment should be the primary penalty for the most serious crimes

VII. PROCEDURAL OPTIONS OPEN TO UGANDA

The Rome Statute contains several provisions that could be invoked in support of domestic trials of the LRA. First, Uganda can, on the basis of Article 16 of the Rome Statute, request the United Nations Security Council to adopt a Chapter VII resolution deferring the ICC investigation or prosecution for a renewable period of one year.[157] However, as discussed below, the Security Council's "power of 'negative' intervention"[158] in the work of the ICC, while possible on paper, is a difficult one in practice. First, in order to convince the Security Council to grant the deferral, Uganda must demonstrate that deferment of the ICC's work would be in the interests of international peace and security under Article 39 of the United Nations Charter[159] and not just in the interest of domestic peace in the country. In other words, at a prima facie level, the Security Council would have to determine that proceeding with the international prosecution would constitute a threat to international peace and security before it can order deferral.

Secondly, even if it were possible for one to convincingly argue that the request would meet the legal threshold to trigger Security Council deferral, Uganda must be able to successfully canvass and convince at least nine of the fifteen members of the Security Council including all of the permanent five.[160] Given the difficult political dynamics and the existing divisions in the Security Council regarding the role of the ICC, it is unlikely that Uganda would be able to muster sufficient political will on the part of Security Council members for them to flex their Article 16 muscle.

Moreover, if the track record of the Security Council on Article 16 matters is anything to go by, then it is highly unlikely that Uganda will succeed even where it chooses to explore this option. In 2009, the African Union itself, the continental body that represents all of Africa's fifty-three

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committed during the Ugandan conflict and that the penalty structure under the Rome Statute, as well as the jurisprudence of the ICTR and ICTY, support the imposition of lengthy terms of imprisonment following convictions for serious international crimes including genocide, war crimes, and crimes against humanity).

[157] Rome Statute, *supra* note 3, art. 16.

[158] DAPO AKANDE ET AL., INST. FOR SEC. STUDIES, AN AFRICAN EXPERT STUDY ON THE AFRICAN UNION CONCERNS ABOUT ARTICLE 16 OF THE ROME STATUTE OF THE ICC 7 (2010).

[159] U.N. Charter art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.").

[160] *Id.* art. 27, para. 3.

member states of the United Nations,[161] invited the Security Council to invoke Article 16 powers so as to defer the ICC investigation against President Omar Hassan Al-Bashir of Sudan, the sitting Sudanese Head of State.[162] In making that request, the African Union reasoned that the ICC investigation and possible issuance of an arrest warrant against President Bashir could derail the Union's peace initiatives in Darfur.[163] Indeed, it was the African Union's position that, while it supported accountability for serious crimes committed in Darfur, this process should be properly sequenced so that the continent's efforts to secure a political settlement are not undermined.[164] Unfortunately, the Security Council did not act on the African Union proposal, leading to strained relations not only between the Union and Security Council, but also between the Union and the ICC.[165] Relations reached their lowest point when the African Union Assembly of Heads of State adopted a Declaration in Sirte, Libya in 2009, calling on its members not to cooperate with the ICC investigation on the Bashir dossier.[166]

Given this experience, it is unlikely that Uganda can succeed on an Article 16 request where the whole of the African Union has failed. While deferment of the LRA case by the Security Council remains a theoretical possibility, in practice it is fraught with difficulty, including the fact that, even if successful, such a deferral would only last for one year at a time, and the drafting history of the Rome Statute does not permit the use of Article 16 as a political weapon to block prosecutions on a permanent basis.[167]

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[161] *AU in a Nutshell*, AFRICAN UNION, http://www.au.int/en/about/nutshell (last visited Nov. 18, 2011).

[162] Assembly of the African Union, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, para. 8(ii), Doc. Assembly/AU/13(XIII) (July 1–3, 2009), *available at* http://www.africa-union.org/root/au/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%20267%20(XIII)%20_e.pdf; African Union, *Communiqué of the 207th Meeting of the Peace and Security Council*, para. 5, Doc. PSC/AHG/COMM.1(CCVII) (Oct. 29, 2009), *available at* http://www.africa-union.org/root/ar/index/Communiqu%20on%20Darfur%20_eng..pdf.

[163] AKANDE ET AL., *supra* note 158, at 10–11.

[164] *Id.* at 11 ("The [African Union was] concern[ed] that regional efforts for long-term peace on the continent should not be undermined by the ICC's interest in short-term prosecutions . . . .").

[165] *Id.* at 5.

[166] Assembly of the African Union, *supra* note 162, para. 10.

[167] *Uganda: Any Alternative to the ICC Should Meet Key Benchmarks*, *supra* note 140 (arguing that in the absence of credible national prosecutions, the Article 16 deferral could, where renewed, be utilized to shield the LRA leadership from facing trial and set a dangerous precedent of political interference in the ICC's judicial work).

The second alternative open to Uganda would be to raise an admissibility challenge before the ICC Pre-Trial Chamber. As it currently stands, the admissibility of the LRA case can be discussed on the basis of two provisions of Article 17 of the Rome Statute that are directly relevant. First, Article 17(1)(a) raises the possibility of an *ex ante* admissibility challenge, i.e., during the course of domestic investigations or prosecutions.[168] An *ex ante* admissibility challenge would invoke the complementarity principle on the front end and, thereby, forestall the ICC from carrying out any investigative or prosecutorial work because the primary jurisdiction state is doing so. This option is no longer available to Uganda in view of its self-referral. Indeed, Uganda itself has submitted before the ICC Pre-Trial Chamber that, in view of its inability to arrest Kony and his colleagues, the country has not conducted domestic proceedings in the case.[169] However, Uganda has prevaricated on the issue with senior government officials, including President Museveni, suggesting that if the LRA were to sign the final peace deal, Uganda would ask the ICC to withdraw the arrest warrants.[170]

The second variant of the admissibility challenge contained in Article 17 takes place *ex post*, i.e., after the completion of domestic proceedings. This variant, which invokes the *ne bis in idem* principle, is to the effect that national proceedings have already taken place and, therefore, that it would be unfair to try the accused a second time for the same conduct.[171] In order for Uganda to successfully invoke this variant of the admissibility challenge, and if the ICC were to grant such a challenge, Uganda must show that national trials of the LRA were credible, fair, not intended to shield particular individuals from responsibility, and conducted in accordance with international standards.

In addition to the procedural options available to Uganda, the ICC Prosecutor also has the power under Article 53 of the Rome Statute to

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[168] Rome Statute, *supra* note 3, art. 17, para. 1(a); Kony Decision on Admissibility, *supra* note 30, paras. 35–43.

[169] Kony Decision on Admissibility, *supra* note 30, para. 37.

[170] *Uganda: Interview with President Yoweri Museveni*, *supra* note 25. Contrast this position with the submissions of Uganda's Solicitor-General before the ICC Pre-Trial Chamber that " 'the Government of Uganda ha[d] not conducted and d[id] not intend to conduct national proceedings in relation to the persons most responsible for these crimes, so that the cases may be dealt with by the ICC instead.' " Kony Decision on Admissibility, *supra* note 30, para. 37 (citation omitted).

[171] Rome Statute, *supra* note 3, arts. 17, para. 1(c), 20, para. 3. Kony Decision on Admissibility, *supra* note 30, paras. 35–43.

discontinue or reconsider ongoing investigations or prosecutions.[172] The Rome Statute confers discretion on the Prosecutor to determine, upon review of information made available to him, that he lacks a reasonable basis to proceed with an investigation or prosecution.[173] Such a conclusion could be based on the Prosecutor's determination, following a review of "the gravity of the crime and the interests of the victims" that ICC prosecution would not be in "the interests of justice."[174] Therefore, the Rome Statute itself provides for a consequentialist analysis of international prosecution. Arguably, the need to secure a peaceful settlement and an end to human suffering that comes with violent conflict or war, provides sufficient reason to invoke the Prosecutor's Article 53 powers.

However, the ICC Prosecutor has argued "that there is a difference between . . . the interests of justice and the interests of peace and that the latter falls within the mandate of institutions *other than* the Office of the Prosecutor."[175] The paper also makes clear that the Prosecutor's exercise of the discretion conferred by Article 53 is of a limited and exceptional nature, which will be guided by the presumption in favor of prosecution, as well as "by the objects and purpose of the Statute" in fighting impunity for serious international crimes.[176]

As regards the Prosecutor's power to reconsider the decision to investigate or prosecute on the basis of new facts or information, it can be argued that a successful domestic trial of the LRA could provide such new facts or information and, thus, justify a decision to drop the warrants against the LRA. Indeed, it is not unreasonable to suggest that the ICC Prosecutor would want to leave this option available, observe the domestic proceedings in Uganda when they take place, and then decide at a later date whether to apply to the Pre-Trial Chamber to drop the arrest warrants. It is further suggested that this approach could be a useful tool to maintain pressure on the Ugandan government to ensure a credible accountability process for the LRA leadership.

VIII. CONCLUSION

The Uganda situation is complex and multi-faceted. A long, drawn-out, violent, internal conflict has eluded peaceful resolution despite various

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[172] Rome Statute, *supra* note 3, art. 53, paras. 1–2, 4.
[173] *Id.* para. 2.
[174] *Id.* para. 1(c).
[175] POLICY PAPER, *supra* note 103, at 1 (emphasis added).
[176] *Id.*

domestic and international initiatives. There is no question that those responsible for committing serious international crimes in the course of this conflict must be brought to justice. It is interesting that the international accountability process set in motion in 2003 through Uganda's self-referral appears to have produced a welcome, albeit unforeseen, willingness of the LRA to negotiate peace. This apparent willingness by the LRA to negotiate peace has led to an agreement that they will face domestic accountability instead of trial at the ICC. However, the LRA's failure to sign on to the final peace deal has raised questions about their real motives and commitment to peace. Given the rebel group's failure to end hostilities and submit to domestic accountability, it appears as though they are merely buying time to continue to wreak havoc on the civilian population in Northern Uganda and beyond. The LRA's stance has, therefore, left the provisions on domestic accountability contained in the Agreement and Annexure hanging in the balance. In addition, the failure of Uganda and its neighbors, such as Sudan and the Democratic Republic of Congo, to arrest Kony or otherwise convince him to surrender for trial has left the ICC warrants in the air without indication if and when they can be meaningfully enforced.

Despite the current situation, it would be unwise to insist upon Hague-based trials of the LRA at all costs. Given the domestic peace imperative, the large domestic constituency that continues to advocate for accountability options other than the ICC, the fact that most of the evidence and victims are located in Uganda, and the comforting fact that Uganda has a functioning legal and judicial system in place, Uganda-based trials offer the best prospect of securing both peace and justice in the LRA case. Yet, it must be emphasized that now is not the time to drop the ICC arrest warrants. As long as the LRA continues to hold out in the jungles of the Democratic Republic of Congo, the ICC warrants must be kept in place as an incentive for them to fully commit to a peace process and benefit from domestic accountability. Similarly, even assuming that the LRA leaders surrender at some point in the near future, the warrants must be kept in place during the pendency of any ensuing national trials so as to encourage the Government of Uganda to ensure fair and credible trials that meet international legal standards. Presumably, credible and genuine domestic trials of the LRA leaders would contribute to the realization of the international community's objective of fighting impunity and promoting accountability for serious violations of international law, while at the same time providing a basis for sustainable peace and reconciliation in Uganda.

As matters stand, there are no winners in the Ugandan situation. The justice processes in both Uganda and the ICC are hamstrung by their failure to arrest Kony and his commanders. The continuing ability of the rebel

leadership to evade justice does not serve the call of Uganda's government and people for a peaceful end to the war. Due to the conflict, victims continue to suffer from an environment of terror and deprivation; the ICC's credibility hangs in the balance because of the perception that the arrest warrants constitute an impediment to a final peace settlement; and the international community's objective of fighting impunity and ensuring accountability for the grave crimes committed in Uganda stays in perpetual abeyance.

Given these circumstances, perhaps the ICC would do well to content itself with the fact that the existence of the arrest warrants has produced a shift in the bargaining positions of the rebel leadership and, presumably, a better disposition on the rebels' part to end the war and face accountability in domestic courts. This can only be a sign of the relative effectiveness of the ICC regime. After all, positive complementarity must account for the effect of the Rome Statute in spurring genuine and effective domestic prosecutions for grave violations of international law. That complementarity would lead to such an outcome was the dream and desire, in other words, the intent of the founders of the Rome Statute. It would be consistent with that intent to pay heed to the delicate political and legal landscape in Uganda by supporting the domestic accountability process—at least for the time being.