Uganda's Response to International Criminal Court Arrest Warrants: A Misguided Approach?

Alex K. Kriksciun*

I. INTRODUCTION

On October 13, 2005, for the first time in its brief history, the International Criminal Court (ICC) unsealed five arrest warrants, following a 2003 Ugandan referral to the ICC's Office of the Prosecutor.[1] These warrants were issued against five senior leaders of the Lord's Resistance Army (LRA), a paramilitary force that has operated in southern Sudan and northern Uganda since 1987.[2] All five men were

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* © 2007 Alex K. Kriksciun. J.D. candidate 2008, Tulane University Law School; B.A. 2003, University of Virginia. The author would like to thank his family for their support, as well as Professor Herbert Larson for his advice and invaluable insight into international criminal law.

1. Press Release, Int'l Criminal Court, Warrant of Arrest Unsealed Against Five LRA Commanders (Oct. 14, 2005), http://www.icc-cpi.int/pressrelease_details&id=114&l=en.html. The arrest warrants were issued on July 8, 2005, but kept under seal until October 2005.

2. *See id.* The leaders are five Ugandan nationals: Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya. Throughout its history, the Lord's Resistance

accused of multiple counts of crimes against humanity and war crimes, with the total number of counts ranging from four to thirty-three.[3]

The warrants alleged a wide variety of human rights abuses including murder, inciting attacks against civilians, enslavement, rape, forced enlisting of children, and inhumane acts.[4] Uganda, Sudan, and the Democratic Republic of the Congo were given notification of the warrants shortly thereafter,[5] and Interpol red notices were issued calling for the arrest of the five men. Although both Uganda and the United Nations agreed to deploy troops to the vicinity,[6] as of publication, none of the LRA leaders named in the arrest warrants have been arrested or otherwise brought under the jurisdiction of the ICC.

Throughout the conflict, the Ugandan government has utilized several different strategies in an attempt to end the hostilities, with varying degrees of success. For example, an "Amnesty Act" that came into force in January 2000 promised a blanket pardon to rebels who renounced armed conflict and surrendered their arms.[7] This amnesty legislation convinced some dissidents to sue for peace, however, three years later, the legislation was amended to exclude LRA leaders so they could be prosecuted by the ICC.[8] This change was also strategic; at the time of the referral, the LRA was retaliating against civilians in response to a government offensive.[9]

More recent methods have proven controversial. After the Ugandan referral but before the ICC issued their arrest warrants, Ugandan President Yoweri Museveni unexpectedly announced his desire to have the ICC drop the LRA case.[10] The most recent drive to end the conflict

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Army has been known by several different names, such as the "Lord's Army," and the "Uganda People's Christian Democratic Army." For the sake of simplicity, this Comment will refer to the group as the "Lord's Resistance Army" or the "LRA." HEIKE BEHREND, ALICE LAKWENA & THE HOLY SPIRITS: WAR IN NORTHERN UGANDA 1986-97, at 179 (Mitch Cohen trans., Ohio Univ. Press 2004) (1999); *see* TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY 37-38 (2006) (detailing the five Ugandan nationals leading the LRA and the different names of the organization throughout its history).

3. Press Release, *supra* note 1.

4. *Id.*

5. Mariam Ahmedani et al., *Updates from the International Criminal Courts*, 13 HUM. RTS. BR. 37, 41-42 (2005).

6. *Id.* at 42. In August 2006, the Ugandan army claimed that it had killed Raska Lukwiya. *See Ugandan Army 'Kills Senior Rebel,'* BBC NEWS, Aug. 13, 2006, http://news.bbc.co.uk/2/hi/africa/4788657.stm.

7. 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, 409 (2005).

8. Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L L. REV. 293, 338-39 (2005).

9. ALLEN, *supra* note 2, at 82.

10. *See* Editorial, *North Conflict Is Now Ending*, NEW VISION (Uganda), Nov. 16, 2004.

began in July 2006, when the Ugandan government and the LRA leadership agreed to meet in Sudan with the ultimate goal of signing a ceasefire.[11] As an incentive to the LRA to engage the government in peace talks, Museveni recently offered support for a pardon to Joseph Kony.[12] This indicates that pardons for other top-level LRA commanders are still a possibility.

This Comment will argue that the new strategy of the Ugandan government is misguided. Part II provides background information and establishes the historical framework of the conflict. Part III explains the function of the ICC, with a particular emphasis on relevant sections of the Rome Statute of the International Criminal Court (Rome Statute). Part IV exposes three legal and theoretical difficulties with extending amnesty or suspending the arrest warrants of the five men indicted by the ICC. These difficulties include Uganda's ignorance of the historical background, the legitimacy of the ICC as an institution, and the illegality of the Ugandan position under the Rome Statute and international law. Part V highlights the benefits of pursuing the LRA leaders and offers a dual path as a potential solution for the crisis.

II. THE UGANDAN CONFLICT IN CONTEXT

A. Historical Background

The history of the current conflict can be traced to a guerilla war between Museveni's National Resistance Army (NRA) and the forces of the Ugandan government. In January 1986, the NRA overran the forces of then-President Tito Okello and captured Kampala, Uganda's capital and largest city.[13] Shortly after Museveni came to power, many soldiers formerly employed by the previous regime fled north and sought refuge in northern Uganda and southern Sudan. At the time, Sudan's Islamic government saw the new Ugandan government as a threat and agreed to support the rebels.[14] One of the groups supported by the Sudanese government was a rebel faction known as the Holy Spirit Movement (HSM). The HSM was led into combat by a woman named Alice Auma, who claimed divine influence through her ability to channel a spirit named Lakwena.[15] After decisive defeats at the hands of the NRA in

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11. *See* Leonard Doyle, *Ugandan Rebel Leader Kony Offered Amnesty*, INDEPENDENT (London), July 5, 2006, at 21.

12. *Id.*

13. BEHREND, *supra* note 2, at 24.

14. Akhavan, *supra* note 7, at 406.

15. BEHREND, *supra* note 2, at 1. Sources refer to Auma as "Alice Auma Lakwena" or "Alice Lakwena" but Alice Auma was her given name. Auma died January 17, 2007, at the age

October and November 1987, the HSM degenerated into a number of smaller movements, and Auma fled into exile.[16]

One of the many people who attempted to fill the power vacuum created by the defeat of the HSM was a young man named Joseph Kony. Relatively little is known of Kony's background; he is a member of the Acholi tribe and a native of Uganda's Gulu District.[17] Kony claimed to be a cousin of Auma, and like the exiled HSM leader, he emphasized his control over the supernatural by declaring himself to be a spirit medium.[18] Throughout 1987 and 1988, Kony's movement gained strength by absorbing smaller rebel groups and remnants of the HSM, and the group soon became the most powerful antigovernment force operating in northern Uganda.[19] The true objective of Kony's newly-christened "Lord's Resistance Army" quickly became apparent: to envelop northern Uganda in a campaign of abduction, brutality, rape, and terror.

B. Joseph Kony's Holy War

In the early years of its existence, the LRA fought in a similar manner to Auma's HSM forces, with soldiers carrying "stone grenades" and sprinkling holy water to confuse the enemy.[20] By the early 1990s, however, the LRA was directly targeting the Acholi and other ethnic groups in northern Uganda.[21] The conflict has been particularly disastrous for children. A database maintained by the Ugandan government and UNICEF suggests that the LRA had abducted over 26,000 children by 2001.[22] In addition, UNICEF estimates that approximately 12,000 abductions occurred between July 2002 and August 2004.[23] Child soldiers comprise approximately eighty-five percent of the LRA's forces, indicating a likely lack of local support in northern Uganda.[24]

Most of the young boys abducted and kept by the LRA become soldiers, but young girls who are taken meet one of several fates. Some

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of fifty in exile at a refugee camp in northern Kenya. Obituary, *Obituary of Alice Lakwena: Ugandan Prophetess Who, Possessed by a Dead Italian Officer, Led Her Holy Spirit Rebels in a Violent Insurgency*, DAILY TELEGRAPH (London), Jan. 20, 2007, at 29.

16. BEHREND, *supra* note 2, at 27-29.
17. *Id.* at 179.
18. *Id.* at 179, 181.
19. *Id.* at 179-82.
20. *Id.* at 184.
21. Akhavan, *supra* note 7, at 407.
22. *Id.*
23. *Id.*
24. *Id. But see* ALLEN, *supra* note 2, at 63 (disputing this oft-cited figure and suggesting that the true figure is lower).

girls are compelled to become the "wives" of LRA leaders and are essentially forced into sexual slavery.[25] Most girls become *ting ting* [servants] to commanders, while others are given military training and participate in abductions and attacks on villages.[26] Both male and female abductees are subjected to severe mistreatment. According to one commentator, the mistreatment is designed to "destroy [the children's] sense of self and eliminate their will to resist."[27] The mistreatment reinforces dependence on the LRA by forcing children to consider themselves outcasts from civilized society.

Although the LRA is arguably best known for its abduction of children and the use of child soldiers, there are also well-documented reports of crimes against adult civilians, including international aid workers.[28] The ongoing conflict has waxed and waned over the years, with periods of relative peace and periods of relative violence.

One example of the latter occurred in 1991 after the Ugandan government armed citizens with bows to defend themselves against the rebels.[29] Kony took this as a sign that the people of northern Uganda no longer supported him and decided to react. In one instance, after encountering one of the "Bow-and-Arrow groups," LRA rebels "kidnapped more than 50 men, women and children and maimed them by cutting off their noses, ears, and hands or by boring a hole through their lips and padlocking their mouths, mutilating their bodies to mark them as traitors."[30] The true extent of the loss in terms of life and property may never be known. Although any number is open to debate given the paucity of reliable information, it is estimated that approximately 100,000 people have died during the conflict.[31] This figure, along with the thousands of abductions and 1.5 million people living in internally displaced persons (IDP) camps as of 2004, indicate that the "holy war" in northern Uganda is a humanitarian crisis of the highest magnitude.[32]

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25. ALLEN, *supra* note 2, at 43.

26. Akhavan, *supra* note 7, at 408.

27. *Id.* at 407-08.

28. *See, e.g.*, Warren Hoge, *Aid Effort in Africa Undermined by New Violence, U.N. Reports*, N.Y. TIMES, Dec. 20, 2005, at A5 (noting that five humanitarian workers were ambushed and killed in October and November 2005).

29. *See* ALLEN, *supra* note 2, at 53.

30. BEHREND, *supra* note 2, at 189.

31. *See, e.g.*, Steve Bloomfield, *Uganda and Rebels Set for Truce After 100,000 Deaths*, INDEPENDENT (London), Aug. 29, 2006, at 21.

32. *See* ALLEN, *supra* note 2, at 53 (explaining that the number of Ugandans living in IDP camps rose from 110,000 in 1997 to approximately 1.5 million in 2004).

C. Suspension and Amnesty

President Museveni recently suggested that two distinct methods may limit the primacy of the ICC investigation. The first method addresses the suspension of the ICC arrest warrants and is based on article 17 of the Rome Statute. As a general rule, article 17 allows the ICC to prosecute a case only if the Member State is unwilling or unable to prosecute on its own.[33] The crux of the argument is that if the LRA leadership participated in certain traditional Acholi rituals, the ICC would be precluded from bringing the accused to trial.[34] Admittedly, this argument has merit, given that the Rome Statute's provisions on the matter are ambiguous, yet the argument fails to consider relevant historical factors, including the question of the ICC's legitimacy.

The second avenue for potentially limiting the ICC's involvement is a new amnesty issued to members of the LRA. As discussed in Part I, Uganda passed an Amnesty Act in 2000, which was partially successful in convincing rebels to come out of hiding.[35] Nonetheless, the conflict was not brought to a halt. A new amnesty was proposed at negotiation talks between Ugandan officials and rebels outside the Sudanese town of Juba (Juba Talks). The Ugandan government offered a blanket amnesty on the condition that Kony "respond[ed] positively to the talks . . . and abandon[ed] terrorism."[36] According to the Ugandan position, the new amnesty would prevent the ICC from prosecuting rebels who accepted amnesty and agreed to abide by its terms. The issue of a blanket amnesty is arguably even more ambiguous than that of suspension. The Rome Statute does not explicitly address the issue, and it is not clear if the ICC is permitted to prosecute a person who has been granted amnesty by a Member State. This will be examined in greater detail in Part IV of this Comment.

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33. Rome Statute of the International Criminal Court art. 17, para. 1(a), July 17, 1998, 37 I.L.M. 1002, 1012 [hereinafter Rome Statute]. Article 17 of the Rome Statute details that a case is inadmissible if it is "being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."

34. *See* Benjamin E.A. Perrin, *Child Soldiers: Legal and Military Challenges in Confronting a Global Phenomenon*, 50 MCGILL L.J. 687, 693 (2005) (book review) (noting that Museveni invoked the language of article 17 and claimed that the ICC would be barred from intervening if tribal reconciliation occurs and Uganda chooses not to pursue action against LRA leaders); Marc Lacey, *Victims of Uganda Atrocities Choose a Path of Forgiveness*, N.Y. TIMES, Apr. 18, 2005, at A1 (describing an Acholi ritual of forgiveness in detail).

35. *See, e.g.*, ALLEN, *supra* note 2, at 75 (estimating that by the middle of 2004, more than 5,000 LRA combatants had applied for the amnesty under the provisions of the legislation).

36. *Uganda Rebels Reject Amnesty*, BBC NEWS, July 7, 2006, http://news.bbc.co.uk/2/hi/africa/5157220.stm.

III. THE ROLE OF THE INTERNATIONAL CRIMINAL COURT

A. Overview and Basic Structure of the Court

Although the purpose of this Comment is not to provide a detailed history or structural analysis of the ICC as an institution, some introductory remarks are appropriate to outline the role of the court in international criminal law. The ICC was designed to hold those who participate in "the most serious crimes of international concern" accountable for their actions.[37] The history of the ICC began with the United Nations Diplomatic Conference of Plenipontentiaries on the Establishment of an International Criminal Court (Rome Conference), attended by 148 nations.[38] On July 17, 1998, the Rome Statute was enacted with 7 of the 148 nations voting against it.[39] The Rome Statute was designed to enter into force after it had been ratified by sixty nations, pursuant to article 126 of its terms; this occurred on July 1, 2002.[40] The four-year ratification period was shorter than several commentators expected and was less lengthy than comparable multinational agreements.[41] It has been suggested that the speed of the ICC's implementation was a reflection of the considerable global desire for its existence.[42]

Article 34 of the Rome Statute divides the ICC into four organs: the Presidency, the judicial panels, the Office of the Prosecutor, and the Registry.[43] In addition, every nation that ratifies the Rome Statute is entitled to have one representative in the ICC's Assembly of States Parties, a body charged with fixing the ICC budget, general management, and other matters.[44] The President of the ICC is responsible for "[t]he proper administration of the court" and must work with the Office of the Prosecutor (Prosecutor) on all matters that are of mutual concern.[45] The Prosecutor is charged with "receiving referrals

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37. Rome Statute, *supra* note 33, art. 1.
38. ALLEN, *supra* note 2, at 17-18.
39. *Id.* at 18.
40. Rome Statute, *supra* note 33, art. 126.
41. Hans-Peter Kaul, *Construction Site for More Justice: The International Criminal Court After Two Years*, 99 AM. J. INT'L L. 370, 370 (2005).
42. *See, e.g.*, Roy S. Lee, *An Assessment of the ICC Statute*, 25 FORDHAM INT'L L.J. 750, 750 (2002). The U.S. government objected to the treaty; President Bill Clinton signed the Rome Statute on the last available day, but announced that he would not seek ratification through the advice and consent of the Senate. *See, e.g.*, Editorial, *Red Meat for Unilateralists*, WASH. POST, Apr. 11, 2002, at A28.
43. Rome Statute, *supra* note 33, art. 34.
44. *Id.* art. 112.
45. *Id.* art. 38, para. 3(a).

and any substantiated information on crimes within the jurisdiction of the Court."[46] Article 34 of the Rome Statute splits the judicial function of the ICC into three panels of judges, including the Pre-Trial Chamber.[47]

The three judges of the Pre-Trial Chamber act as a limitation on the power of the Prosecutor. The Prosecutor must first determine that there is a "reasonable basis to proceed with an investigation" pursuant to article 15 of the Rome Statute.[48] If there is a basis to proceed, "he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation."[49] The Prosecutor will begin the investigation if the Pre-Trial Chamber determines there is a reasonable basis to do so, otherwise, the matter will be dismissed unless the Prosecutor resubmits the request with additional evidence.[50]

Two aspects of the Rome Statute merit further examination when considering the facts surrounding the LRA case: the ICC's jurisdiction over defendants, and the corollary principles of complementarity and *non bis in idem*.

B. The Jurisdiction of the Court

On the whole, the ICC has rather limited jurisdiction to prosecute individuals for human rights abuses. Before the ICC can begin an investigation, there are three facets of jurisdiction that must be satisfied: temporal jurisdiction, territorial jurisdiction, and subject matter jurisdiction. The temporal jurisdiction of the ICC is outlined in article 11 of the Rome Statute. Article 11 dictates that the ICC will have jurisdiction "only with respect to crimes committed after the entry into force of this Statute."[51] Therefore, the ICC can only take into account LRA crimes committed after July 1, 2002, when the Rome Statute was ratified by the required number of nations.[52]

The Rome Statute also contains several stipulations addressing territorial jurisdiction. When a nation ratifies the Rome Statute, it automatically accepts the oversight of the ICC.[53] If the violations took

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46. *Id.* art. 42, para. 1.

47. *Id.* art. 34. The two remaining panels of judges are the Trial Chamber and the Appeals Division, neither of which have had an opportunity to hear a case as of March 2007.

48. *Id.* art. 15, para. 3.

49. *Id.*

50. *Id.* art. 15, para. 5.

51. *Id.* art. 11, para. 1.

52. To emphasize the importance of this point, the Rome Statute contains a nonretroactivity provision, which states that "[n]o person shall be criminally responsible . . . for conduct prior to the entry into force of the Statute." *Id.* art. 24, para. 1.

53. *Id.* art. 12, para. 2(a). This section of the treaty provides that "[a] State which becomes a Party . . . thereby accepts jurisdiction of the Court."

place within the territory of a Rome Statute signatory, the court can exercise its jurisdiction pursuant to article 12. The ICC can also assume jurisdiction over the matter when the alleged perpetrator is a national of a signatory nation.[54]

For the purposes of this Comment, the most notable aspect of the ICC's jurisdiction is the court's subject matter jurisdiction. Article 5 of the Rome Statute limits the ICC's subject matter jurisdiction to "the most serious crimes of concern to the international community as a whole."[55] The treaty enumerates the four offenses that comprise such most serious crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.[56] Yet, what constitutes a crime against humanity? What constitutes a war crime? The Rome Statute provides answers to these questions with extensively detailed elements, providing the Prosecutor with guidance and discretion.

Article 7 of the Rome Statute addresses crimes against humanity. As a threshold matter, for the ICC to begin an investigation, the crimes against humanity must be committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[57] Furthermore, the offenses must be "pursuant to or in furtherance of a State or organizational policy to commit such attack."[58] The Rome Statute contains a lengthy list of what could be considered elements of a crime against humanity. These potential elements can include murder, enslavement, imprisonment, sexual slavery, enforced prostitution, or any other "inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[59]

The portion of the Rome Statute addressing war crimes contains an even longer list of potential elements of the offense. Pursuant to article 8, any grave breaches against people or property protected by the Geneva Convention of 1949 will suffice.[60] Nevertheless, "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an

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54. *Id.* art. 12, para. 2(b).

55. *Id.* art. 5, para. 1.

56. *Id.* The crime of aggression is not defined in the Rome Statute, and has not been defined by the ICC. In addition, terrorism is not listed as a crime over which the ICC can assert jurisdiction. Some commentators have suggested that certain terrorist acts, such as those that occurred on September 11, 2001, would constitute crimes against humanity under the Rome Statute. *See, e.g.*, Lee, *supra* note 42, at 756.

57. Rome Statute, *supra* note 33, art. 7, para. 1.

58. *Id.* art. 7, para. 2(a).

59. *Id.* art. 7, para. 1(a)-(k).

60. *Id.* art. 8, para. 2(a). These include torture, inhuman treatment, execution, unlawful confinement, and hostage taking, among other offenses.

international character, within the established framework of international law" can also fall within the Rome Statute's construction of war crimes.[61] These violations can include intentionally directing attacks against civilians, intentionally attacking humanitarian missions, committing rape, compelling sexual slavery, or enforcing prostitution, or "conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities."[62] Before the ICC can assert jurisdiction over war crimes, the elements of the crime must be "committed as a part of a plan or policy or as a part of a large-scale commission of such crimes."[63]

C. The Court's System of Complementarity

The principle of complementarity has been called "one of the main governing principles upon which the operation of the [ICC] is premised."[64] Complementarity deals with the relationship between supranational judicial bodies such as the ICC, and national judicial bodies such as the Supreme Court of the United States. In essence, complementarity dictates that a supranational judicial body should have jurisdiction over a case only when the national judicial body is not prosecuting a crime. The converse is also true: complementarity guarantees that the supranational body will not supersede the primacy of the national body if the national body is prosecuting the crime. Therefore, the supranational body is said to "complement" the national body by providing a forum when the latter is not involved in the case.

The principle of complementarity in international law is not a novel one. After World War I, Germany agreed to allow the Allies to try war criminals as required by the Treaty of Versailles.[65] The Allies were fearful that the postwar German regime would collapse. They agreed to permit Germany to try certain offenders in the highest German court in order to promote the government's stability.[66] At the same time, the Allies wanted to reserve the right to set aside the verdicts and try the accused war criminals in an international tribunal set up specifically for that purpose.[67] In response, the German government passed legislation in order to take

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61. *Id.* art. 8, para. 2(e).
62. *Id.*
63. *Id.* art. 8, para. 1.
64. Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery To Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 870 (2002).
65. *Id.* at 871.
66. *Id.* at 872.
67. *Id.*

jurisdiction over the war criminals and prosecute them under German law.[68]

A similar situation occurred years later during the Nuremburg trials after the conclusion of World War II. Only twenty-one members of the Nazi regime were brought before the tribunal, despite many others being accused of various crimes after the war.[69] Many of the accused were sent to the countries where the crimes took place so that they could be tried there.[70]

Both these examples reveal an important observation of the complementarity principle. Nations employ state sovereignty as justification to make and enforce laws within their borders. For example, the Restatement (Third) of the Foreign Relations Law of the United States explains that "a state has jurisdiction to prescribe law with respect to . . . conduct that, wholly or in a substantial part, takes place within its territory."[71] Yet, the expressed purpose of the ICC is to "put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention" of crimes that concern the international community as a whole.[72] These interests, however, are in opposition to each other. Every signatory to the Rome Statute gave up some sovereignty to help create the ICC. Therefore, the idea of complementarity can perhaps be best understood as a compromise between the competing interests of territorial sovereignty and the desire to punish wrongdoers on an international scale.

Although the term "complementarity" is not defined in the Rome Statute, the text can provide some guidance as to its ultimate meaning. Both the preamble and article 1 of the Treaty state that the ICC "shall be complementary to national criminal jurisdictions."[73] This language reemphasizes that the ICC should not invade the primacy of national courts. The first portion of the Rome Statute that deals directly with complementarity is article 17. One of the most important provisions of the entire Treaty dictates that a case is inadmissible if it "is being investigated or prosecuted by a State which has jurisdiction over it, unless

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68. *Id.*

69. The tribunal had originally sought to try twenty-four defendants. Gustav Krupp von Bohlen und Halbach was seriously ill and could not stand trial, Martin Bormann was not present and was tried in absentia, and Robert Ley committed suicide before his trial was to begin. *See* ROBERT K. WOETZEL, THE NUREMBURG TRIALS IN INTERNATIONAL LAW: WITH A POSTLUDE ON THE EICHMANN CASE 1-2 (1962).

70. El Zeidy, *supra* note 64, at 874-75.

71. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1986).

72. Rome Statute, *supra* note 33, pmbl.

73. *Id.* pmbl., art. 1.

the State is unwilling or unable genuinely to carry out the investigation or prosecution."[74] Subject to this language, the Prosecutor must prove that a state is "unwilling or unable genuinely" to prosecute the alleged human rights abuses before asserting jurisdiction.[75] The clause is inherently ambiguous and would seem to offer the Prosecutor a great deal of discretion to make an independent determination. The language of article 17, however, provides some guidance for interpreting both the "unwillingness" and the "inability" standards.

With respect to unwillingness, the Rome Statute requires the ICC to consider three factors to determine if a local prosecution violates the standard and could therefore assert jurisdiction. First, the court must determine if the process is "for the purpose of shielding the person" from the ICC's jurisdiction.[76] Second, any "unjustified delay in the proceedings . . . inconsistent with an intent to bring the person concerned to justice" must be taken into account.[77] Third, the extent to which the proceedings are "being conducted independently or impartially" should be considered.[78] When considering whether the local prosecution violates the "inability standard," the Rome Statute advises that "the Court shall consider whether, due to a total or substantial collapse, or unavailability of its national judicial system, the State is . . . unable to carry out its proceedings."[79] Accordingly, if a nation is unable to carry out proceedings as a result of a total or substantial collapse of its judicial system, the ICC can invoke jurisdiction.

If an ICC member state has already tried a person of interest to the court, the principle of *non bis in idem* set forth in article 20 of the Rome Statute provides a corollary to the complementarity of article 17.[80] The *non bis in idem* principle prevents the ICC from prosecuting a person who has already been exonerated in the national judicial system of a Member State. As a threshold issue, to invoke *non bis in idem*, an offender must have "been tried by another court for conduct also proscribed under articles 6, 7, or 8."[81] The final portion of this clause is readily understandable; articles 6, 7, and 8 of the Rome Statute address

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74. *Id.* art. 17, para. 1(a).
75. *Id.*
76. *Id.* art. 17, para. 2(a).
77. *Id.* art. 17, para. 2(b).
78. *Id.* art. 17, para. 2(c).
79. *Id.* art. 17, para. 3.
80. The English translation of *non bis in idem* is "not twice for the same (crime)." Thus, it is analogous to the concept of "double jeopardy" in Anglo-American juris-prudence. BLACK'S LAW DICTIONARY 1077 (8th ed. 2004).
81. Rome Statute, *supra* note 33, art. 20, para. 3.

genocide, crimes against humanity, and war crimes, respectively. These articles suggest that if an alleged violator is acquitted of conduct rising to the level of crimes against humanity, war crimes, or genocide in a national court, the ICC will be precluded from asserting jurisdiction over the case. The first part of the clause is more troublesome, as neither the words "tried" nor "court" are defined in the Rome Statute. *Black's Law Dictionary* defines a court as a "governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice."[82] A trial is defined as "a formal judicial examination of evidence and determination of legal claims in an adversary proceeding."[83]

Assuming that a violator can overcome the burden of showing that he was tried in a national court, he must still show that the proceedings were legitimate to take advantage of *non bis in idem*. Making a determination of legitimacy is, therefore, of the utmost importance when determining whether to invoke the *non bis in idem* principle. The test for legitimacy is similar to the test offered for unwillingness in article 17. If the justification for the local prosecution is "for the purpose of shielding the person concerned from criminal responsibility," then the prosecution is not legitimate.[84] In addition, the prosecution will not be considered legitimate if it was "not conducted independently or impartially" and was "conducted in a manner . . . inconsistent with an intent to bring the person concerned to justice."[85]

IV. THREE JUSTIFICATIONS FOR REVERSING THE CURRENT UGANDAN RESPONSE

A. Difficulties with the Ugandan Position

Although President Museveni has recently expressed support for a blanket amnesty and suspension of ICC arrest warrants, Uganda should not follow this course of action. Museveni's concerns are certainly understandable considering the LRA has been fighting for nearly twenty years with brief interludes of peace punctuating the abductions and killings. Several commentators and news outlets reported that the arrest warrants had a significant effect on Kony and the other LRA leaders.[86] Indeed, after the arrest warrants were unsealed, one of the LRA leaders

82. BLACK'S LAW DICTIONARY 378 (8th ed. 2004).
83. *Id.* at 1543.
84. Rome Statute, *supra* note 33, art. 20, para. 3(a).
85. *Id.* art. 20, para. 3(b).
86. *See, e.g.*, Jeffrey Gettleman, *U.N. Envoy Meets with Ugandan Rebel*, N.Y. TIMES, Nov. 13, 2006, at A3 (referring to arrest warrants as the "stickiest issue" and noting that Kony will not surrender while they are in force).

fled to the Democratic Republic of the Congo (DRC). The DRC has ratified the Rome Statute, and, therefore, has a duty to arrest those with outstanding ICC warrants.[87] As aforementioned, the Ugandan government reacted to this development by initiating the Juba Talks, which produced a ceasefire and led to Museveni's declaration that the Ugandan government was no longer unwilling or unable to prosecute the case.[88] Apparently, Museveni considered the ICC a means to bring the rebels to the bargaining table rather than a means to bring them to justice. This, however, runs contrary to the stated purpose of the ICC.

The difficulties with the Ugandan position are threefold. First, the new position patently ignores the history of the conflict. Over the last twenty years, the Ugandan government has tried to end the atrocities numerous times, only to see the LRA use the government's goodwill to buy more time, strengthen their position, and resume the conflict. There is no guarantee that the LRA will end their activities in northern Uganda if they follow the latest mandate from the government. Moreover, the recent developments bear similarities to the previous efforts of the Ugandan government to end the uprising, all of which were unsuccessful. Second, if Uganda succeeds in its plan to effectively allow the LRA to avoid ICC prosecution, the legitimacy of the ICC itself will be called into question. The ICC has gained international recognition since its creation. If the Court is no longer allowed to prosecute the case, this recognition will be squandered and the Court's authority may be called into question. Third, and most fundamentally, the express language of the Rome Statute provides no basis for withdrawal of ICC indictments or arrest warrants. Due to this absence, the treaty implicitly suggests that withdrawal should not occur. The text of the Rome Statute is only ambiguous with respect to punishing those who have been granted amnesty.

B. Is Uganda Ignoring History?

The history surrounding the LRA conflict implies that Museveni's call for a blanket amnesty is misguided; the conflict has followed a relatively predictable pattern throughout its duration and there has been no resolution. One commentator for a nongovernmental organization (NGO) working in Uganda noted that each phase of the conflict begins with "acute violence which gradually reduces—though it never

87. Ahmedani et al., *supra* note 5, at 42.
88. Editorial, *The Hague's Rash Step*, GLOBE & MAIL (Toronto), July 11, 2006, at A12.

disappears—until a failed 'peace initiative' releases a renewed wave of ever more intensive violence from [that] of the preceding war."[89]

The first cycle began after the LRA started to gain strength and became particularly violent after a failed Ugandan army initiative and the "Bow-and-Arrow" campaign.[90] The Ugandan government's military offensive, dubbed Operation North, weakened the LRA considerably, but fostered widespread resentment among the local populace.[91] After Operation North ended, a government minister named Betty Bigombe began negotiations with the rebels. Initially, these efforts seemed to be successful, as Bigombe met Kony face to face and arranged a brief ceasefire.[92] Yet, President Museveni eventually imposed a seven-day ultimatum on the rebels, inciting them to return to violence three days later.[93] Museveni claimed that he had received information alleging that the LRA was only engaging in peace negotiations to bolster their fighting ability, but the truth of this claim has been debated.[94] The government of Sudan provided the LRA with "weapons, ammunition, fuel, communications equipment, and training" which increased their viability as a fighting force.[95] Sudanese support also necessitated more manpower, and some of the LRA's worst attacks took place in the period immediately following the collapse of the Bigombe negotiations.[96]

The next serious effort to negotiate a protracted peace occurred in the late 1990s when the Sudanese government invited the Carter Center to negotiate a settlement.[97] Although the negotiations resulted in an agreement between the Sudanese and Ugandan governments to stop supporting rebels in the other nation's territory, this did little to end the conflict.[98]

The Ugandan government's last sustained military offensive against the LRA began in 2002 with the commencement of Operation Iron Fist.[99]

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89. Chris Dolan, *What Do You Remember? A Rough Guide to the War in Northern Uganda 1986-2000*, at 4 (Agency for Co-operation & Res. in Dev., Working Paper No. 33, 2000), *available at* http://www.acord.org.uk/r-pubs-Cope%20Working%20Paper%2033.PDF.

90. *Behind the Violence: Causes, Consequences, and the Search for Solutions in Northern Uganda* 6 (Refugee Law Project, Working Paper No. 11, 2004), *available at* http://www.refugeelawproject.org/resources/papers/workingpapers/rlp/wp11.pdf [hereinafter *Behind the Violence*].

91. *Id.*

92. ALLEN, *supra* note 2, at 47-48.

93. *Id.* at 48.

94. *Id.*

95. *Behind the Violence*, *supra* note 90, at 18.

96. ALLEN, *supra* note 2, at 49.

97. *Id.* at 50-51.

98. *Id.* at 51.

99. *Id.* at 50.

During the operation, Sudan permitted the Ugandan government to come onto Sudanese soil to conduct operations against the LRA.[100] Although there were some military successes in Operation Iron Fist, enthusiasm was tempered by a fresh round of LRA attacks, as the rebels were "allowed to outflank the [government] forces and had almost a free rein in northern Uganda, moving into new territories and perpetrating new massacres, notably in Lira district."[101]

Following the failure of Operation Iron Fist, the Ugandan government once again turned its attention to the possibility of a negotiated settlement. The Juba Talks began after prodding from the newly autonomous government of Southern Sudan, which sought to rid itself of the LRA for good.[102] Like the Bigombe-led negotiations, the initial rounds of the Juba Talks were seen as largely positive, and were even referred to as "the best chance of ending the 20-year war in northern Uganda."[103] A ceasefire went into effect on August 29, 2006, the terms of which required LRA soldiers to gather at two assembly zones to engage in further negotiations.[104] Unfortunately, these promising developments soon broke down, and the LRA abandoned the talks after accusing the Ugandan army of violating the August ceasefire.[105] The Juba Talks appear to have stalled indefinitely despite intense international pressure on both the LRA and the Ugandan government. The issue of ICC prosecution has remained completely unresolved, as the LRA leadership "indicated that no deal can be signed while warrants for their arrest remain in place."[106]

The process of survival has become second nature to the LRA. When confronted with a Ugandan military offensive, the rebels move to a different locale and begin their atrocities anew. Conversely, if the Ugandan government tries to end the conflict through a negotiated settlement, the LRA will appear to be accommodating for a time before abandoning the talks. Clearly, the ICC arrest warrants have put pressure

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100. *Id.* at 51. Operation Iron Fist consisted of two separate offenses, the first of which began in 2002, and the second in 2004. Uganda's second incursion into Sudanese territory was considered much more successful than the first. *See id.* at 52.

101. *Id.*

102. Evelyn Leopold, *Southern Sudanese Government To Begin Talks with Rebel Army*, INDEPENDENT (London), June 9, 2006, at 29.

103. *Uganda Rebels Drop Truce Demand*, BBC NEWS, Aug. 14, 2006, http://news.bbc.co.uk/2/hi/africa/4790049.stm.

104. Associated Press, *Peace Bid After 19-Year Slaughter*, HERALD SUN (Australia), Aug. 28, 2006, at 24.

105. Reuters, *Uganda Rebel Willing To Face Trial*, WASH. POST, Dec. 21, 2006, at A25.

106. *Rebels Snub Ugandan Peace Talks*, BBC NEWS, Jan. 12, 2007, http://news.bbc.co.uk/2/hi/africa/6255369.stm.

on Kony and the other four senior commanders. As a former legal advisor to the International Criminal Tribunal for Rwanda noted, "[t]he reality is that the ICC referral has significantly weakened the LRA by pressuring Sudan to stop harboring rebel camps. The new-found LRA willingness to negotiate with the government is a mark of desperation resulting from this new reality."[107]

This is a critical time in the conflict. The LRA is weakened and appears to be in the process of completely abandoning the Juba Talks. The Ugandan government should continue to put pressure on the weakened rebel group and encourage neighboring countries to do the same. To do otherwise gives the LRA a chance to regroup, ignores the historical aspect of the conflict, and invites the cycles of violence to continue. Doing nothing could be ruinous, considering that when there is a lull in the peace talks, the LRA historically has been dangerous.

C. The Question of Legitimacy

The second justification for continued ICC prosecution involves the existence of the ICC itself. Since its inception, the ICC has made notable strides in establishing itself as a legitimate tribunal in international criminal law. The Rome Statute has been signed by 139 nations, while 104 nations have either acceded to or ratified the treaty.[108] More than fifty-four percent of the 192 United Nations Member States have therefore ratified the treaty, and more than seventy-two percent have signed it.[109] This data may not seem overwhelming at first, but it must be kept in mind that these figures represent a majority of nations worldwide. Furthermore, the ICC is the first institution of its kind.

In addition to the speed of the Rome Statute's entry into force, other factors point to a global desire to make the ICC a viable judicial body. Less than a year after the Ugandan state referral, the Prosecutor received referrals from the Central African Republic and the DRC.[110] The latter referral, concerning Congolese militia leader Thomas Lubanga Dyilo,

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107. Akhavan, *supra* note 7, at 416.

108. Amnesty Int'l, The International Criminal Court: Table of Signatures and Ratifications of the Rome Statute, http://web.amnesty.org/pages/icc-signatures_ratifications-eng (last visited Aug. 29, 2007).

109. United Nations, List of Member States, http://www.un.org/members/list.shtml (last visited Aug. 29, 2007).

110. Press Release, Int'l Criminal Court, Prosecutor Receives Referral Concerning Central African Republic (Jan. 7, 2005), *available at* http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html; Press Release, Int'l Criminal Court, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (Apr. 19, 2004), *available at* http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html.

will likely produce the court's most tangible result to date when Dyilo stands trial in the Hague.[111]

Some commentators have suggested that the U.S. government, long one of the ICC's staunchest critics, may be softening its stance on the court.[112] Ironically, perhaps the most worthwhile demonstration of the ICC's importance comes from those the organization accuses. The LRA has emphasized "they will not sign a peace deal unless the [ICC] . . . lifts its arrest warrants against its leader, Joseph Kony, and four of his senior associates."[113] If those most directly affected by ICC arrest warrants fear the power of the Court, then it has made a significant impact in international criminal law.

It is imperative that the ICC continue its investigation. Otherwise, the Court will forfeit the legitimacy it has obtained and defeat the purpose of its own existence. The Preamble to the Rome Statute advises that the ICC was created in part "to put an end to impunity."[114] If the ICC arrest warrants are withdrawn or an amnesty is accepted, Kony and other senior LRA commanders will become the worldwide face of impunity. The importance of this point is underscored by the fact that the LRA arrest warrants are the first issued by the ICC. If impunity occurs in the LRA case, what message will it send to ICC Member States that have their own internal difficulties and want to refer matters to the Court in the future? ICC officials are understandably concerned that if the LRA leadership is granted an exception, leaders in the DRC and the Central African Republic may demand exceptions as well.[115] The ICC must stand by its warrants to ensure other nations are not dissuaded from future referrals. At this stage in the proceedings, suspension of the arrest warrants would erode the support that the ICC has developed since its creation.

A similar problem in terms of legitimacy concerns the potential abuse of the ICC as a political tool. President Museveni's actions over

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111. On January 29, 2007, the Pre-Trial Chamber determined that there was sufficient evidence to send Congolese militia leader Thomas Lubanga Dyilo to trial. Press Release, Int'l Criminal Court, Pre-Trial Chamber I Commits Thomas Lubanga Dyilo for Trial (Jan. 29, 2007), http://www.icc-cpi.int/pressrelease_details&id=220&l=en.html.

112. *See, e.g.*, Warren Hoge, *U.N. Votes To Send any Sudan War Crime Suspects to World Court*, N.Y. TIMES, Apr. 1, 2005, at A6 (arguing that the Bush Administration's decision to not oppose the U.N. Security Council referral of the Darfur matter to the ICC indicates a shift in diplomatic strategy).

113. *Uganda: Museveni Optimistic Peace Will Prevail*, IRIN, Dec. 5, 2006, http://www.irinnews.org/report.aspx?reportid=62326.

114. Rome Statute, *supra* note 33, pmbl.

115. *See, e.g.*, *Uganda Peace Talks Called Off as Warlord's Amnesty Ruled Out*, IRISH TIMES, Sept. 16, 2006, at 9.

the past several years indicate that the Ugandan government views the ICC as a means of ending the conflict rather than a way to bring violators to justice. The Ugandan state referral came at a time when the military solution was not producing a foreseeable end to the conflict. While Operation Iron Fist weakened the LRA's military base, atrocities were still being committed at a high rate.[116] ICC involvement in the case weakened the position of the LRA both diplomatically and militarily; when Museveni reached out to Kony in 2005, goodwill was reciprocated.[117] If the Ugandan government withdraws its support for the ICC at this critical stage, the nation will be suggesting that bringing an end to the insurrection, by any means necessary, is its top priority. From a pragmatic point of view this approach makes sense. Many ordinary people in northern Uganda surely do not care about the ICC process because they simply want the killings and abductions to stop.

Realistically, the Ugandan position is problematic. The government may want to leave the ICC out of the process, but the ICC will not accept this approach without a fight. Indeed, Luis Moreno-Ocampo, the ICC's chief prosecutor, recently stressed his belief that a blanket amnesty violates the Rome Statute and "that the best way to finally stop the conflict after 19 years is to arrest the top leaders."[118] The ICC has no police force and must rely on individual nations to arrest suspects, but one can assume ICC officials will do everything in their power to ensure that the LRA case comes to trial. If the ICC is not permitted to prosecute the LRA leadership, other states will be encouraged to use the Court for attempts to end internal conflicts rather than to bring violators to justice. This policy cannot be reconciled with the preamble of the Rome Statute; it stands in direct opposition to the purposes of the ICC. As Richard Goldstone, the former chief prosecutor at the International Criminal Tribunal for the former Yugoslavia noted, "[t]he ICC is not a political tool of the Ugandan Government. Uganda is a State Party to the Rome Statute. It cannot unilaterally withdraw the ICC arrest warrants as it is under an international legal obligation to ensure that they are enforced."[119] If the ICC warrants are suspended or a blanket amnesty is accepted, the

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116. *See, e.g.*, Akhavan, *supra* note 7, at 404 ("All of these developments are in sharp contrast to the period preceding the referral, during which LRA atrocities reached a new peak.").

117. *See id.* at 416 (explaining that the ICC arrest warrants weakened the LRA by putting pressure on Sudan).

118. Editorial, *supra* note 88.

119. Press Release, Int'l Bar Ass'n, IBA Says Ugandan Government Must Meet Its Obligations Under the Rome Statute (July 13, 2006), http://www.ibanet.org/iba/article.cfm?article=88.

strides made by the ICC will go to waste, and the desire of many nations to make the ICC a legitimate tribunal will be thwarted.

D. Application of the Rome Statute

Arguably, the most important issue in the analysis of the LRA case is whether the Rome Statute permits a suspension of ICC arrest warrants or a national amnesty. As a starting point, article 86 of the Rome Statute states that ICC members "shall . . . cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."[120] The jurisdictional element is not an obstacle. Uganda has ratified the Rome Statute and has therefore accepted the territorial jurisdiction of the ICC pursuant to article 12. The five accused LRA leaders are Ugandan nationals, and many of the alleged atrocities took place on Ugandan territory; these facts lend support to the article 12 basis for territorial primacy of the ICC.[121] Although the LRA has at times denied committing any atrocities, their claims cannot be taken seriously given the sheer mass of independent evidence to the contrary. The offenses perpetrated by the LRA fall within the ICC's articles 7 and 8 subject matter jurisdiction for crimes against humanity and war crimes. In addition, the murders, abductions, enslavement, and other crimes compelled approximately 1.5 million people to flee their homes and to take up residence in IDP camps as of 2004.[122] This migration provides additional support for the point that the actions of the LRA are among the "serious crimes" that are "of concern to the international community as a whole."[123] These attacks have been systematic against a local population and part of a plan or policy, which meet the requirements outlined for crimes against humanity and war crimes.[124] Finally, the ICC's temporal jurisdiction can be established for offenses of the LRA that took place after July 1, 2002.

Absent from the text of the Rome Statute is a provision allowing a signatory to halt a prosecution that has already commenced. In Uganda's case, a referral was made to the Prosecutor pursuant to article 14 of the Rome Statute.[125] This permitted the Prosecutor to begin his own

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120. Rome Statute, *supra* note 33, art. 86.

121. *Id.* art. 12, para. 2(a)-(b).

122. ALLEN, *supra* note 2, at 53.

123. Rome Statute, *supra* note 33, art. 5, para. 1.

124. *See id.* art. 7, para. 1 (stating that acts must be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" to constitute a crime against humanity).

125. *Id.* art. 14, para. 1 ("A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed.").

investigation without having to resort to his own initiative; the process eventually resulted in the issuance of arrest warrants. In the event that the referring state informs the ICC of an intention to conduct its own investigation, the prosecutor is required to defer to the state investigation unless otherwise authorized by the Pre-Trial Chamber.[126] This request is the only input that a referring state is legally permitted after making its referral. Uganda did not make such a request.

Although Uganda does not have the power to compel the ICC to stop a prosecution, the Prosecutor may have such a power under article 53. If "the Prosecutor concludes that there is not a sufficient basis for a prosecution because . . . [a] prosecution is not in the interests of justice . . . the Prosecutor shall inform the Pre-Trial Chamber [of] the reasons for the conclusion."[127] What this article means in practice is not readily apparent. One commentator asked ICC officials in July 2005 if this provision suggested that the LRA prosecution would not proceed and was told that

> as the chief prosecutor has recently said in public, it is possible to "suspend" the prosecution if it is not in the interests of justice. I asked what that meant. "Suspend" is not the same as "stop". The answer was not exactly clear, but implied that prosecution might be suspended if there is a comprehensive settlement, but that impunity was impossible. This is not quite what it says in Article 53.[128]

In addition, the Prosecutor is permitted to reconsider a decision to prosecute if new facts or information come to light.[129] If Uganda could convince the Prosecutor to invoke its article 53 powers, the Prosecutor could conceivably stop the investigation. However, Uganda cannot stop the investigation on its own.

President Museveni's claim that the principle of complementarity should allow Uganda to commence its own prosecution cannot be summarily dismissed. The premise of this argument is that the traditional Acholi reconciliation process should prevent the ICC from moving forward on the case. A closer look at the proposed reconciliation process and the language of articles 17 and 20 of the Rome Statute, however, implies that this is not the case. Many NGOs and Ugandan tribal leaders have asserted that the system of "Acholi justice" is an established fact,

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126. *Id.* art. 18, para. 2.
127. *Id.* art. 53, para. 2(c).
128. ALLEN, *supra* note 2, at 176.
129. Rome Statute, *supra* note 33, art. 53, para. 4.

and that this system of justice is preferable to ICC prosecution.[130] The truth is more complicated. There are several traditional Acholi rituals that are designed to foster reconciliation, including *mato oput* [bitter root or juice], *gomo tong* [the bending of spears], and *nyono tong gweno* [stepping on eggs].[131]

Mato oput is a ritual performed after a homicide, designed to reconcile a killer to the deceased's family.[132] During the ritual, the offender must admit responsibility, ask for forgiveness, drink sheep's blood mixed with the *mato oput* root, and pay compensation to the family of the deceased.[133] The purpose of the *gomo tong* ritual is to resolve disputes between tribal clans, while the *nyono tong gweno* ritual involves stepping on an egg with one's foot as a healing ritual.[134] On the whole, these three ceremonies, along with other traditional Acholi rituals, are often referred to simply as *mato oput*.[135]

It is unclear to what extent the local populace is supportive of an alternative to ICC prosecution. Several NGOs and religious leaders have been extremely vocal in their support of *mato oput*, but these leaders do not necessarily speak for the entire population. The results of a 2005 survey conducted by the International Center for Transitional Justice and the Human Rights Center may be illustrative of the general population's view. According to the survey, three quarters of respondents indicated that the LRA should be "held accountable for their crimes in northern Uganda."[136] Of those respondents who had heard of the ICC, ninety-one percent thought the Court would contribute to peace, and eighty-nine percent thought that it would contribute to justice.[137] Alternatively, a researcher for the Refugee Law Project found that "[i]nterviews conducted in northern Uganda showed . . . there is overwhelming support for the amnesty process."[138] These findings are not mutually exclusive; one could support prosecuting the LRA leadership for their actions while

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130. ALLEN, *supra* note 2, at 132 ("At the local level, arguments against the ICC intervention have been propounded most forcefully by certain traditional and religious leaders.").

131. *Id.* at 132-34.

132. *Id.* at 133.

133. *Id.* at 132-33.

134. *Id.* at 132-34.

135. *Id.* at 134.

136. Int'l Ctr. for Transitional Justice, Punish Impunity in Northern Uganda (Sept. 19, 2005), http://www.ictj.org/en/news/coverage/article/319.html.

137. *Id.*

138. Refugee Law Project, *Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation* 9 (Refugee Law Project, *available at* Working Paper No. 15, 2005), *available at* http://www.refugeelawproject.org/resources/papers/workingpapers/.

at the same time favoring amnesty for lower ranking members. Admittedly, the extent of local support has little, if any, bearing on the provisions of the Rome Statute. It reinforces, however, the point that traditional remedies may not be preferable to ICC proceedings.

The key to the analysis of the *mato oput* process as a substitute for ICC prosecution lies in the language of article 17. It may be the case that the Ugandan government is no longer unwilling or unable to undertake their duty, but this is not dispositive, as the complementarity principle only applies when the matter is "being investigated or prosecuted by a State which has jurisdiction over it."[139] Uganda is offering amnesty to suspected LRA combatants while the nation is not formally investigating or prosecuting any of the men indicted in the ICC arrest warrants by any account. Therefore, Museveni's claim fails on this initial issue.

If the LRA leaders surrendered to Ugandan authorities and were absolved through *mato oput*, the final portion of article 17 would arguably not preclude the ICC from prosecuting the case. The purpose of extending *mato oput* to Kony and the other four men appears to be to prevent them from being prosecuted by the ICC. It is also worth noting that *mato oput* has only been offered as a potential remedy in the past several years, while *gomo tong* may have been performed for the last time in the early 1980s.[140] In addition, Museveni's recent comments clearly indicate that he views the *mato oput* process as a suitable substitute for ICC prosecution.[141] This suggests that Uganda is motivated, at least in part, to avoid ICC prosecution of the LRA leadership. A similar argument can be made to claim that *mato oput* is not in the interests of justice as required by article 17. By logical extension, then, who gets to determine the meaning of "justice" for the purposes of the Rome Statute? If one considers the Western system of justice to be paramount, then *mato oput* cannot be a substitute for ICC prosecution; the LRA leaders would get away with impunity and would not be held accountable for their actions in a court of law. If one considers justice as having more of a conciliatory tone, then perhaps the *mato oput* system can suffice. Yet, given the Rome Statute's expressed desire of ending impunity and holding offenders accountable for their crimes, the former view must carry more weight.

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139. Rome Statute, *supra* note 33, art. 17, para. 1(a).

140. *See* ALLEN, *supra* note 2, at 132-34 (arguing that *mato oput* has only become institutionalized in the years since 1997, after Acholi leaders attended a conference in London with the purpose of devising a peaceful solution to the conflict).

141. *See, e.g.*, Perrin, *supra* note 34, at 692-93.

The principle of *non bis in idem* is also of critical importance when taking *mato oput* into consideration. As explained earlier, the accused must be "tried by another court" before taking advantage of *non bis in idem*.[142] Although traditional remedies may be legitimate in the eyes of some religious and political leaders, they cannot be considered legitimate for the purposes of article 20 for three reasons. First, *mato oput* cannot be considered a "trial" under the Rome Statute. *Mato oput* is essentially a set of reconciliation rituals that stress the admission of guilt and readmission into society. These rituals carry no connotation of judicial examination, determination of legal claims, or adversarial proceedings.[143]

Second, *mato oput* cannot meet the standard of a "court" under Article 20 because it has not been established by the Ugandan government, is not presided over by judicial officers, and does not administer "justice" in the commonly understood sense.[144] Although the precise way in which *mato oput* is performed differs from ritual to ritual, one April 2005 description is typical. The former rebels "stuck their bare right feet in a freshly cracked egg . . . brushed against the branch of a pobo tree . . . [stepped] over a pole . . . [and] were welcomed back into the community."[145] With all respect to Acholi culture and customs, a ritual of this type comes nowhere near the standard envisioned in article 20.

Finally, as is the case with article 17, a strong argument can be made that *mato oput* is designed to shield high ranking LRA officers from prosecution and is not in the interest of justice. The thoughts of a former LRA brigadier lend support to this assertion. After admitting he would perform *mato oput*, he was the asked by a researcher "whether he would really look into the faces of those he had harmed and agree to pay compensation. To this he replied that he would not. [The researcher then asked] whether he thought the ceremony really meant anything. He smiled, indicating that he did not."[146] If former rebels do not take *mato oput* seriously, then the ICC has no reason to see it as a legitimate method of punishment and stop its investigation.

The legality of a blanket amnesty under the Rome Statute poses different issues than those addressed by suspension of arrest warrants. Much of the problem derives from the text of the Rome Statute; the treaty is wholly devoid of any mention of amnesty or pardons. Perhaps

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142. Rome Statute, *supra* note 33, art. 20(3).
143. *See* BLACK'S LAW DICTIONARY 1543 (8th ed. 2004) (defining "trial").
144. *See id.* at 378 (defining "court").
145. Lacey, *supra* note 34.
146. ALLEN, *supra* note 2, at 166.

the closest analogue is the stipulation in article 27 that official capacity shall be irrelevant to ICC investigations. However, this stipulation does not quite target the issue.[147] There was considerable debate at the Rome Conference regarding a provision allowing the ICC to have jurisdiction over those granted amnesty.[148] Apparently, some delegations were in favor of the measure, some felt that it would interfere with the political process, and still others felt that an explicit provision was unnecessary because article 17 would cover those granted amnesty in bad faith.[149]

Like the attendees of the Rome Conference, members of the legal community have divergent views on the issue. A former ICC legal scholar suggests that confession-based amnesties can "in certain circumstances [be] a necessary and morally acceptable option for the ICC."[150] Other commentators argue that the ICC should "reject amnesties that violate international justice."[151]

There are several ways to approach the amnesty problem. From a purely teleological point of view, granting a blanket amnesty to the LRA stands in opposition to the ICC's expressed purpose of ending impunity. A second argument against allowing amnesty to preclude ICC investigation derives from article 17 of the Rome Statute. The fact that Uganda is not formally investigating or prosecuting the LRA leadership suggests that the ICC should continue to prosecute the case. Article 17 states that the ICC shall determine that a case is inadmissible if it is being "investigated or prosecuted by a State which has jurisdiction over it."[152] A fair reading of this provision is that a case cannot be determined to be inadmissible until it is investigated or prosecuted, irrespective of an amnesty offer. Moreover, an amnesty offer without investigation or prosecution is strong evidence that a nation is "unwilling or unable" to try a case, allowing the ICC to assert its jurisdiction.[153]

Finally, fundamental obligations of international law advise that Rome Statute signatories should not offer amnesty to individuals under

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147. Article 27 states in part that "official capacity as a Head of State or Government, a member of a Government or Parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute." Rome Statute, *supra* note 33, art. 27, para. 1.

148. El Zeidy, *supra* note 64, at 941-42.

149. *Id.*

150. 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, 871 (2006).

151. Gwen K. Young, Comment, *Amnesty and Accountability*, 35 U.C. DAVIS L. REV. 427, 476 (2002).

152. Rome Statute, *supra* note 33, art. 17, para. 1(a).

153. *See id.*

ICC investigation. International law is divided into a hierarchical system of norms, with some considered more important than others.[154] Occupying the top position in the hierarchy are "rules of international law [that] are recognized . . . as peremptory, permitting no derogation."[155] Such rules are referred to as *jus cogens* norms. It is difficult to dispute that the actions of the LRA, if true, constitute violations of *jus cogens* norms. Even though the principle of *jus cogens* is almost always applied to nations, it applies equally to an armed insurgency that has engaged in systematic violations of international law. If *jus cogens* norms are violated, statutes of limitation no longer apply, any nation may exercise jurisdiction over the accused, and every nation is duty-bound to prosecute or extradite violators found within its territory.[156] Uganda has neither prosecuted nor taken steps to ensure the extradition of the LRA leadership. More importantly, classifying crimes as violations of *jus cogens* norms provides nations with an obligation to deny impunity to those who commit such crimes.[157] Because a blanket amnesty is a method of denying impunity, it violates this obligation, assuming that the crimes are violations of *jus cogens* norms.

V. CONCLUSIONS AND A PROPOSED SOLUTION

The war in northern Uganda continues today. At one time in 2006, the Juba Talks were considered an extremely positive development, but the new Ugandan position and the indefinite nature of the talks have led to greater international scrutiny. The final Juba-negotiated ceasefire expired on March 1, 2007, and there are new fears that northern Uganda will once again be plagued by violence.[158] In June, the rebels and the Ugandan government reached an agreement to use *mato oput* as a part of the reconciliation process, but the ICC arrest warrants remained a major "stumbling block" to further discussion.[159] The talks were briefly suspended in late August to allow for victim consultation, with Uganda

154. EDWARD M. WISE, ELLEN S. PODGOR & ROGER S. CLARK, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 58 (2004).

155. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1986).

156. El Zeidy, *supra* note 64, at 947.

157. *Id.* at 948.

158. *Fear Grips North as Truce Passes*, IRIN, Feb. 28, 2007, http://irinnews.org/Report.aspx?ReportId=70455.

159. LRA Talks Reach Agreement on Accountability, IRIN, June 30, 2007, http://irinnews.org/Report.aspx?ReportId=73010.

expressing an interest in setting up its own tribunal to prosecute LRA members.[160]

This Comment has argued that Uganda should not grant a blanket amnesty, nor should ICC arrest warrants be withdrawn, for three principal reasons. At the same time, there are practical considerations weighing in favor of continued ICC and Ugandan pressure on the LRA. First, and most importantly, the ICC arrest warrants have weakened the position of the LRA considerably. Sudan is no longer willing to offer support, which has fractured the LRA and put it in a difficult position.[161] Amnesty or suspension of the warrants could give the rebel movement time to regroup and begin the atrocities anew. Second, the history of the conflict indicates that the Ugandan government has had more success with military campaigns than with peace talks. Admittedly, this success has been limited, but the Ugandan army has shown that it can weaken the LRA if given the chance. The amnesty process and the potential for suspending the arrest warrants eliminates a weapon at the disposal of the Ugandan government. Third, the structure of the LRA itself lends support to ICC prosecution. The LRA is led by a charismatic leader, who depends on a small cadre of highly dedicated supporters and a large force of child soldiers (with widely varying degrees of loyalty) to carry out attacks.[162] If Kony and other LRA leaders can be captured and brought to justice, this could very well induce the remaining supporters to give up their arms. Capturing Kony is surely easier said than done; he has evaded capture for nearly twenty years and has fervent supporters. This difficult goal could be made easier if Uganda sought the support of its neighbors, particularly Sudan. Finally, it should be emphasized that the LRA recently rejected the Ugandan offer of a blanket amnesty.[163] An LRA spokesman justified this rejection on the basis that "we negotiate as equal persons on the table so it is . . . redundant for the president of Uganda to come out and say we are offering amnesty to the LRA

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160. *Uganda Considers War Crimes Court*, BBC NEWS, Aug. 20, 2007, http://news.bbc.co.uk/2/hi/africa/6954860.stm.

161. Akhavan, *supra* note 7, at 416.

162. *See* Press Release, Int'l Criminal Court, Background Information on the Situation in Uganda, http://www.icc-cpi.int/press/pressreleases/77.html (last visited Sept. 6, 2007) (arguing that over eighty-five percent of the LRA is comprised of children); Nora Boustany, *Uganda's Plight Pressed on Capitol Hill: Activists Call for U.S. Role in Negotiating Peace for Nation's War-Torn North*, WASH. POST, Oct. 11, 2006, at A13 (describing Kony as messianic and charismatic).

163. *Uganda LRA Rebels Reject Amnesty*, BBC NEWS, July 7, 2006, http:///news.bbc.co.uk/2/hi/africa/5157220.stm.

leaders."[164] Statements such as these demonstrate that any blanket amnesty might be an exercise in futility.

On the other hand, a limited amnesty or reconciliation-based system for other LRA combatants should be viewed as a positive step toward peace. Many LRA soldiers were taken from their homes at a young age and have served the LRA for many years. Some of these combatants are precluded from ICC prosecution by article 26 of the Rome Statute, which dictates that the ICC "shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."[165] Others likely exceed this age threshold by virtue of being held captive for an extended period of time and would not be protected by the provisions of article 26. In any case, children who have been abducted by the LRA will not face ICC prosecution. The tribulations of child soldiers have been well documented, and those children who fight on behalf of the LRA suffer from similar maltreatment. These children are frequently brutalized and traumatized by their supervisors and essentially become chattels of high ranking LRA members. The results of such treatment can be predictably devastating. One commentator has observed:

> The trauma arising from such ruthless internal discipline is exacerbated by forcing children to attack villages (often their own communities), to kill and torture civilians, to burn homes and pillage property, and to abduct other children. Upon release or escape, many children are so severely traumatized by their experiences that their full rehabilitation and return to normal social life are unattainable.[166]

Full rehabilitation may be unattainable, but an attempt should still be made. Whether rehabilitation should be in the form of *mato oput*, amnesty, a tribunal similar to South Africa's Truth and Reconciliation Commission, or some other method is beyond the scope of this Comment. It cannot be ignored, however, that if the LRA conflict comes to a close, there will be hundreds or even thousands of former child soldiers and LRA "wives" who will need to be reintegrated into society. As one commentator observed, "the functional importance of the ICC in subjecting top LRA leaders to criminal justice should not overshadow the equally important grassroots process of traditional restorative justice and forgiveness."[167] This grassroots process will be significant to ensure Uganda's smooth transition into a post-LRA existence.

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164. *Id.*
165. Rome Statute, *supra* note 33, art. 26.
166. Akhavan, *supra* note 7, at 408.
167. *Id.* at 421.

This "dual path" represents a viable chance to finally put an end to the conflict. The Ugandan government should apply pressure to the LRA leadership while simultaneously urging its neighbors to do the same and doing its best to implement a process to reintroduce the LRA rank and file back into society. Regardless of the process chosen, Joseph Kony and the other LRA leaders should not be a part of it. Uganda is a party to the Rome Statute, and as such, it has an obligation to ensure that those indicted under the ICC are brought to justice. These indictments cannot be withdrawn or subverted by Ugandan calls for complementarity or a blanket amnesty. For better or worse, Uganda involved the ICC in the process via their state referral; the two parties have since become inexorably intertwined. Considering "the basic fact that the Court can only be as strong as the states parties make it," it is imperative that the two sides work together to end the conflict if the ICC is to be an effective tribunal in the future.[168]

168. Kaul, *supra* note 41, at 384.