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Manisuli Ssenyonjo

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by Manisuli Ssenyonjo*

* Lecturer in Law, School of Law, Brunel University, West London. Unless otherwise indicated, all internet references were last visited on 1 December 2006.

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1. INTRODUCTION

By December 2006 there were three self-referrals of situations to the Prosecutor of the International Criminal Court (ICC or 'the Court') by states, and they were all based in the African region.[1] There was also one Security Council (SC) referral of the situation in Darfur in Sudan.[2] The self-referrals of Uganda (December 2003), the Democratic Republic of the Congo – DRC (April 2004), and Central African Republic (January 2005), as well as the SC referral of the situation in Sudan (March 2005) have dictated the initial focus of the ICC prosecutorial efforts in the African region.[3] The first referral was made by Ugandan President Yoweri Museveni concerning the so-called Lord's Resistance Army/Movement (LRA/M), a rebel group led by Joseph Kony.[4] The LRA/M has been active mainly in the sub-region of Northern Uganda, referred to locally as Acholi or Acholiland (comprised of Gulu, Kitgum and Pader districts) claiming it is fighting for democracy,[5] constitutional reforms,[6] and against the marginalisation of tribes in Northern and Eastern Uganda,[7] and that it wants to replace the Ugandan government with one based on the Biblical Ten Commandments.[8] The rebels claimed that the Ugandan 'government intentionally under-developed and impoverished Eastern and Northern Uganda as a political tool of control and repression'.[9] Despite this claim the LRA/M failed to provide a coherent political platform and increasingly focused mainly on attacking civilians, abducting schoolchildren, forcing the girls to be sex slaves and the boys to be brutal killers leading to a gross and consistent pattern of human rights violations.[10] It is estimated that the LRA rebels have abducted more than 25,000 children; killed

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1. ICC-01/04 Situation in the Democratic Republic of the Congo (DRC); ICC-02/04 Situation in Uganda; ICC-01/05 Situation in Central African Republic. See ICC, *Situations and Cases*, <www.icc-cpi.int/cases.html>.

2. ICC-02/05 Situation in Darfur, Sudan; SC Res. 1593 (2005), 31 March 2005, A/RES/1593 (2005).

3. O. Bekou and S. Shah, 'Realising the Potential of the International Criminal Court: The African Experience', 3 *Human Rights L Rev.* (2006) pp. 499-544.

4. See T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London, Zed Books 2006) ch. 2.

5. S. Farmar, 'Uganda Rebel Leader Breaks Silence', *BBC News*, 28 June 2006, <news.bbc.co.uk/>.

6. M. Ojul, 'Latest Statement on Demands by the LRA Delegation', *Daily Monitor*, 25 October 2006.

7. See S. Nganda, 'Inside Kony Peace Talks', *The Weekly Observer* (Kampala, Observer Media Ltd.), 20 July 2006; J. Ochieno, 'NRA Sowed Seeds of the 20-year Old Rebellion in the North in 1986', *Daily Monitor*, 25 August 2006.

8. See F. Nyakairu, 'We are Fighting for 10 Commandments', *Daily Monitor*, 1 August 2006.

9. Ojul, *supra* n. 6.

10. See M. Ssenyonjo, 'Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court', 10 *Journal of Conflict and Security Law* (2005) pp. 405-434.

tens of thousands of civilians;[11] and driven between 1.6 to 2 million people from their homes to settle in Internally Displaced Persons (IDPs) camps.[12] This has led to the characterisation of the LRA as a 'terrorist organisation' by both the Ugandan government[13] and the United States (US).[14] The United Nations (UN) Under Secretary-General for Humanitarian Affairs, Jan Egeland recently described the LRA's activities as 'terrorism of the worst kind anywhere in the world'.[15]

The conflict has plagued Northern Uganda and Southern Sudan for two decades. Following intensive operations by the Uganda Peoples' Defence Forces (UPDF) in Northern Uganda and Southern Sudan, and indictments of the LRA/M top leaders by the ICC,[16] the majority of the LRA rebels fled to Garamba National Park in the DRC in September 2005.[17] Although the ICC had issued warrants of arrest (to the Ugandan government) for five senior leaders of the LRA in July 2005, on 14 July 2006 peace talks began between the Ugandan government and the rebel LRA/M in Juba, the capital of the regional government of Southern Sudan (GOSS). According to the Ugandan government it determined in July 2006, at the urging of the GOSS, to enter into negotiations with the LRA 'to seek a permanent end to the 20-year conflict' and due to continuing difficulties in effecting arrest, including the problem of protecting women and children abductees, and the lack of adequate support from regional and international partners.[18]

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11. Integrated Regional Information Network (IRIN), 'Sudan-Uganda: LRA Child Abductees Cry for Home', Nabanga, 31 July 2006, available at <www.irinnews.org/report.aspx?reportid=59792>.

12. Relief Web, 'Uganda Seeks Aid for 1.6 Million Internally Displaced People', 18 November 2004; J. Motlagh, *Analysis: Northern Uganda's Invisible Crisis* (Washington, DC, United Press International 21 March 2005). In August 2006 the Head of the United Nations Development Fund for Women, Micheline Ravololonarisoa, regretted the indifference of the 'international community towards the suffering of the people in Northern Uganda during the 20-year armed conflict' and noted: 'We have been guilty of conspiracy of silence to the pleas, cries, and suffering of the people of Northern Uganda.' See J. Luggya, 'UN Boss Sorry for Neglecting War in North', *Daily Monitor*, 7 August 2006.

13. Anti-Terrorism Act 2002 (Act No. 14 of 2002), *The Uganda Gazette* No. 33, Vol. XCV, 7 June 2002.

14. US Department of State, 'Terrorist Exclusion List Designees', 5 December 2001, available at <www.state.gov/r/pa/prs/ps/2001/6695.htm>.

15. See '"Amnesty" for Uganda Rebel Chief', *BBC News*, 4 July 2006, available at <news.bbc.co.uk/2/hi/africa/5147882.stm>.

16. *The Prosecutor* v. *Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen*, Case ICC-02/04-01/05; P. Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the ICC', 99 *AJIL* (2005) pp. 403-421; see *infra* section 2.

17. See E. Allio, 'LRA Clash with DRC Forces', *The New Vision*, 29 August 2006.

18. See Submission of Information on the Status of the Execution of the Warrants of Arrest in The Situation in Uganda, ICC-02/04-01/05, 6 October 2006, hereinafter 'the Prosecutor's Submission'.

As part of a peace package, the Ugandan government delegation offered 'total amnesty' to all LRA combatants, including five top LRA leaders for whom the ICC had issued arrest warrants on charges of war crimes and crimes against humanity.[19] In November 2006, President Museveni rejected a proposal by the Belgian government to arrest Joseph Kony and surrender him to the ICC and argued that Kony should be given an amnesty if he agrees to end the conflict through the ongoing peace talks.[20] Thus, instead of providing its fullest support and cooperation for the ICC's work, the Ugandan government – at least on the face of it – indicated its unwillingness to comply with the obligation to arrest and surrender, pursuant to the request from the ICC contrary to Article 89 of the Rome Statute of the International Criminal Court (Rome Statute/ ICC Statute).[21] Surrendering a person to the ICC is a precondition before any trial, as trials *in absentia* are not permitted under the Rome Statute.[22] Although there has been no request to the Office of the ICC Prosecutor (OTP) for a withdrawal of the LRA leaders' arrest warrants or a request for an amnesty from the ICC,[23] by offering an amnesty to the LRA leaders the Ugandan government has arguably attempted to use the judicial process of the ICC as a political tool in its negotiations with the LRA/M.[24] By so doing, it has sought to undermine the justice it called on the Court to ensure.[25] It is, therefore, less surprising that on 30 November 2006 the ICC Chamber requested the Prosecutor to provide additional information, on or before Friday 8 December 2006 'whether and to what extent the peace negotiations and recent events in the region have affected the level of cooperation by the relevant governments'.[26]

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19. See *infra* section 3. The term amnesty has been defined as: 'A pardon extended by the government to a group or class of persons, usually for a political offence; the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted.' See *Black's Law Dictionary*, 8th edn. (St. Paul, MN, Thomson 2004) p. 93.

20. See Vision Reporter, 'M7 Rejects Kony Hunt', *The New Vision*, 17 November 2006. See also n. 185 and accompanying text.

21. *Infra* n. 28. Art. 89(1) provides: 'The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request …, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.'

22. ICC Statute, Art. 63(1) states: 'The accused shall be present during the trial.'

23. ICC Press Release, 'Statement by the Chief Prosecutor Luis Moreno-Ocampo', 12 July 2006, ICC-OTP-20060712-149-En; the Prosecutor's Submission, *supra* n. 18, at para. 27.

24. President Museveni stated: 'Those conversations [Juba talks] are to enable Kony not to go to the International Criminal Court.' See R. Muhumuza, 'Kony Rebels Refuse to Sign Peace Deal', *Daily Monitor*, 10 October 2006. Uganda's Prime Minister, Prof. Apollo Nsibambi stated: 'We need all the military, legal and political pressure because we have been fighting for 20 years.' See C. Musoke, 'LRA Need ICC, Army Pressure – Nsibambi', *The New Vision*, 1 December 2006.

25. Amnesty International (AI), 'Uganda: Amnesty International calls for an Effective Alternative to Impunity', AI Index: AFR 59/004/2006 (4 August 2006).

26. Pre-Trial Chamber II, Order to the Prosecutor for the Submission of Additional Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda, No. ICC-02/04-01/05, 30 November 2006, para. 2.

The main question considered in this article is whether a State Party to the ICC Statute can grant a 'total amnesty' to individuals indicted by the ICC and thereby shield them from the ICC prosecution. Can the ICC Prosecutor consider such grant of 'total amnesty' as unwillingness on the part of a state to prosecute, justifying the withdrawal of indictments against those indicted? Is the ICC Prosecutor bound by such amnesty? Is the grant of such amnesty a legal bar to the exercise of jurisdiction by the Court? If so, on what grounds?

2. PROSECUTING THE LRA/M LEADERS FOR WAR CRIMES AND CRIMES AGAINST HUMANITY

In December 2003, the Ugandan President – Yoweri Museveni – referred the situation in Northern Uganda to the ICC Prosecutor to investigate crimes committed by the LRA[27] pursuant to Article 14 of the ICC Statute,[28] which permits States Parties to that treaty to 'refer to the [ICC] Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed'. The self-referral was made public on 29 January 2004.[29] This was the first time a state has made such a referral.[30] Thereafter, the Chief Prosecutor of the ICC, Luis Moreno-Ocampo, determined that there was 'a reasonable basis to open an investigation into the situation concerning Northern Uganda'.[31] Since it has been claimed that some serious crimes in the conflict (including willful killing of civilians, torture of civilians alleged to be 'rebel collaborators', and rape) were committed by the government soldiers – the UPDF –[32] the ICC Prosecutor indicated that he 'will determine whether the gravity and complementarity requirements of the Statute are met for an investigation'.[33] It is not clear, however, whether the ICC would in practice investigate or try Ugandan government military personnel because the ICC's Chief Prosecutor needs cooperation from the government and his investigators

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27. Akhavan, *supra* n. 16.

28. 37 *ILM* (1998) p. 999, 104 States Parties as of 1 January 2007.

29. See ICC Press Release, 'President of Uganda refers Situation concerning the Lord's Resistance Army (LRA) to the ICC', 29 January 2004, available at <www.icc-cpi.int/pressrelease_details&id=16.html>.

30. See ICC, *Situations and Cases*, available at <www.icc-cpi.int/cases.html>.

31. ICC Press Release, 'Prosecutor of the International Criminal Court opens an investigation into Northern Uganda', 29 July 2004, available at <www.icc-cpi.int/pressrelease_details&id=33&l=en.html>.

32. Human Rights Watch (HRW), 'Human Rights Overview: Uganda', January 2004, available at <hrw.org/english/docs/2004/01/21/uganda6981.htm>; HRW, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, Vol. 17, No. 12(A) (September 2005) p. 37 noted: 'Very little transparency or accountability for UPDF or LRA abuses exists in Northern Uganda. Both perpetrate abuses of civilians in the North with almost complete impunity.'

33. L. Moreno-Ocampo, 'Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives', 21 *Am. Univ. Int'l L Rev.* (2006) pp. 497-503 at p. 501.

need protection by the Ugandan army.[34] Since then, the ICC's investigation moved forward and added pressure especially against the LRA.[35]

On 9 July 2005, the ICC Pre-Trial Chamber II (the Chamber) issued warrants of arrest, under seal, naming five senior leaders of the LRA (Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen)[36] and charged these LRA leaders with crimes against humanity (see ICC Statute, Art. 7(1)) and war crimes (ICC Statute, Art. 8(2)(c)).[37] On 27 September 2005, following an urgent application by the OTP, the Chamber ordered that the Registrar transmit, under seal, Requests for Arrest and Surrender to the governments of Uganda, the DRC, and Sudan.[38] Annexed to these Requests for Arrest and Surrender, and also transmitted confidentially, were the warrants issued on 8 July 2005 for Otti, Lukwiya, Odhiambo and Ongwen, and an amended warrant of arrest naming Kony.[39] On 13 October 2005, the ICC Pre-Trial Chamber II unsealed the warrants of arrest for five senior leaders of the LRA and the Requests for Arrest and Surrender.[40] These warrants of arrest are important because they are the first to be issued by the ICC since its creation by the Rome Statute adopted on 17 July 1998.[41] As a follow-up to these warrants, on

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34. K. Glassborow, 'Peace Versus Justice in Uganda', *Africa Report* No. 77, 27 September 2006, available at <iwpr.net/?p=acr&s=f&o=324160&apc_state=heniacr200609>.

35. See International Crisis Group (ICG), 'Shock Therapy for Northern Uganda's Peace Process', *Africa Briefing* No. 23, 11 April 2005, and 'Peace in Northern Uganda: Decisive Weeks Ahead', *Africa Briefing* No. 22, 21 February 2005.

36. Major General Raska Lukwiya, the LRA's third senior-most commander, was killed by the UPDF on 12 August 2006. See Submission of Information Regarding Raska Lukwiya, ICC-02/04-01/05-97, 14 August 2006; C. Ochowun, 'Wanted LRA Leader Killed', *Sunday Vision*, 13 August 2006; the Prosecutor's Submission, *supra* n. 18, at para. 9.

37. See Decision on the Prosecutor's Application for Warrants of Arrest Under Article 58, ICC-02/04-01/05-1, 8 July 2005; Warrant of Arrest for Joseph Kony, ICC-02/04-01/05-2-US-Exp, 8 July 2005; Warrant Of Arrest For Vincent Otti, ICC-02/04-01/05-4-US-Exp, 8 July 2005; Warrant of Arrest for Raska Lukwiya, ICC-02/04-01/05-6-US-Exp, 8 July 2005; Warrant of Arrest for Okot Odhiambo, ICC-02/04-01/05-8-US-Exp, 8 July 2005; Warrant of Arrest for Dominic Ongwen, ICC-02/04-01/05-10-US-Exp, 8 July 2005. Also on 8 July 2005, the Chamber issued corresponding Requests for Arrest and Surrender addressed solely to Uganda. See ICC-02/04-01/05-12-US-Exp to ICC-02/04-01/05-16-US-Exp, 8 July 2005.

38. See Decision on the Prosecutor's Urgent Application Dated 26 September 2005, ICC-02/04-01/05-27, 27 September 2005 (hereinafter '27 September 2005 Decision'). For the Requests for Arrest and Surrender addressed to the DRC, see ICC-02/04-01/05-30-US-Exp to ICC-02/04-01/05-34-US-Exp, 27 September 2005. For the Requests for Arrest and Surrender addressed to Sudan, see ICC-02/04-01/05-35-US-Exp to ICC-02/04-01/05-39-US-Exp, 27 September 2005. The Warrant naming Joseph Kony and the Request for Arrest and Surrender naming Kony addressed to the Government of Uganda were amended, also on 27 September 2005, at the request of the OTP. See 27 September 2005 Decision, p. 5.

39. Ibid.

40. See Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest, ICC-02/04-01/05-52, 13 October 2005, pp. 7-8; ICC Press Release, 'Warrant of Arrest unsealed against five LRA Commanders', 14 October 2005, available at <www.icc-cpi.int/press/press releases/114.html>.

41. These warrants are available at <www.icc-cpi.int/cases/UGD.html>. The warrant of ar-

1 June 2006 the International Criminal Police Organisation – Interpol – issued Red Notices for the arrest of the five LRA commanders named in the ICC arrest warrants.[42] These are the first wanted persons notices to be issued by Interpol following a request by the OTP.[43] These notices ensure that the descriptions of the persons named in the warrants, and their status as persons whose arrests are sought, is known globally.

However, the Court has a limited mandate to pursue justice but no power of its own to execute its warrants, and the international community, including its staunchest supporters, has thus far failed to put in place effective practical mechanisms to uphold its authority and bring the armed conflict to an end.[44] Due to the lack of power to execute its warrants, on 15 September 2006, the Pre-Trial Chamber requested the Prosecutor to submit to the Chamber, on or before Friday 6 October 2006, without prejudice to his powers and functions under the Statute, 'information and comments in writing on the status of cooperation with the relevant states and with the Registry as regards the execution of the Warrants'.[45] In order to execute these warrants, it is essential that all states respect demands of justice and international criminal accountability not only in Northern Uganda, but also wherever such crimes occur.

It is also essential to note that the ICC operates on a system of complementarity, in that the Court was intended to be 'complementary to national criminal jurisdictions'.[46] It follows that, first and foremost, it is a responsibility of the respective national court to prosecute violators of crimes stated in Article 5 of the ICC Statute. States Parties are not only encouraged, but also seen as preferable, to prosecute the accused in their own courts leaving the ICC as essentially

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rest for Joseph Kony lists thirty-three counts on the basis of his individual criminal responsibility (Arts. 25(3)(a) and 25(3)(b) of the ICC Statute) including twelve counts of crimes against humanity (murder – Art. 7(1)(a); enslavement – Art. 7(1)(c); sexual enslavement – Art. 7(1)(g); rape – Art. 7(1)(g); inhumane acts of inflicting serious bodily injury and suffering – Art. 7(1)(k)), and other counts of war crimes (murder – Art. 8(2)(c)(i); cruel treatment of civilians – Art. 8(2)(e)(i); intentionally directing an attack against a civilian population – Art. 8(2)(e)(i); pillaging – Art. 8(2)(e)(v); inducing rape – Art. 8(2)(e)(vi); forced enlisting of children – 8(2)(e)(vii)).

42. ICC Press Release, 'Interpol Issues First ICC Red Notices', 1 June 2006, available at <www.icc-cpi.int/press/pressreleases/151.html>. The notices can be viewed at the following links:
Kony: <www.interpol.int/public/data/wanted/notices/data/2006/20/2006_26320.asp?HM=1>;
Otti: <www.interpol.int/public/data/wanted/notices/data/2006/17/2006_26317.asp?HM=1>;
Lukwiya: <www.interpol.int/public/data/wanted/notices/data/2006/15/2006_26315.asp?HM=1>;
Odhiambo: <www.interpol.int/public/data/wanted/notices/data/2006/18/2006_26318.asp?HM=1>;
Ongwen: <www.interpol.int/public/data/wanted/notices/data/2006/21/2006_26321.asp?HM=1>.

43. Ibid.

44. ICG, 'A Strategy for Ending Northern Uganda's Crisis', *Africa Briefing* No. 35, 11 January 2006.

45. Pre-Trial Chamber II, Situation In Uganda: In the Case of the *Prosecutor* v. *Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwtya, Dominic Ongwen*, ICC-02/04-01/05, 15 September 2006; the Prosecutor's Submission, *supra* n. 18, at para. 9.

46. ICC Statute, Preamble, para. 11 and Art. 1.

a legal institution of 'last resort'.[47] The ICC considers a case inadmissible under Article 17(1)(a) 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'.[48]

At the time of the self-referral to the ICC, Uganda had an effective and functioning national judicial system (including the High Court, Court of Appeal and Supreme Court) far from 'a total or substantial collapse' or 'unavailability'.[49] Two questions arise here: first, can a state whose judicial system has not suffered 'a total or substantial collapse or unavailability', and thus willing and able to prosecute, voluntarily confer jurisdiction to the ICC? Second, if the answer is in the affirmative, does this not open wide gates for using the ICC as a state's political tool of exposing dangerous rebels internationally thereby undermining its international credibility (as an essentially judicial body) and offend its complementary nature?

In our view, the complementary provisions of the ICC should be understood as requiring that no case should be admissible where a state's judicial system has not suffered 'due to a total or substantial collapse or unavailability'. As argued below, this would safeguard against the possible use of the ICC as a political tool or as a less politically and financially costly alternative.[50]

3. USING AMNESTY AS A TOOL FOR NEGOTIATING PEACE WITH THE LRA/M

Several attempts to broker an end to the notorious armed conflict have failed in the past to end the conflict since the LRA/M took leadership of a regional rebellion in 1988 in a bid to oust Ugandan President Yoweri Museveni.[51] The

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47. M.C. Bassiouni, 'The ICC – *Quo Vadis*?', 4 *Journal of International Criminal Justice* (2006) pp. 421-427 at p. 422.

48. Under Art. 17(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.'

49. As noted by Prof. Kanyeihamba: 'Uganda Courts, have not only the jurisdiction, the power and courage to intervene in cases where the rights and freedoms of citizens are allegedly violated or the exercise of government powers challenged but have been prepared to grant appropriate remedies.' See G.W. Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance* (Kampala, Renaissance 2006) p. 55.

50. See also H. Moy, 'The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementality', 19 *Harv. Human Rights Journal* (2006) pp. 267-273 at p. 273; A. Slaughter and W. Burke-White, 'The Future of International Law is Domestic (or, the European Way of Law)', 47 *Harvard ILJ* (2006) pp. 327-352 at p. 347.

51. See C. Rodriguez, 'More Talk Than Peace in Northern Uganda', *The Weekly Observer*, 1 June 2006.

most recent peace talks were held in the Southern Sudanese city of Juba from July 2006 mediated by the GOSS between the delegation of the government of Uganda and the LRA.[52] The talks led to the signing of a formal agreement for cessation of hostilities signed on 26 August, which took effect on 29 August 2006, pending the negotiation of a comprehensive peace agreement.[53] This agreement conditioned a temporary cease-fire upon the movement of the LRA forces into two assembly zones in Southern Sudan: one in Owiny Kibul and the other in Ri-Kwangba.[54]

3.1 Case for amnesty for LRA/M leaders

Arguments for amnesty (particularly post-conflict amnesty)[55] assert that Article 6(5) of Additional Protocol II of 1977 permits states to grant amnesties in these terms:

> 'At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.'[56]

This provision has been understood to apply to the ordinary crimes of all rank and file participants, but not to the authors (political and military leaders) who bear the greatest responsibility for international crimes.[57] In addition, it has been argued that state practice does not support a customary rule that prohibits

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52. The government delegation was led by Ruhakana Rugunda, Minister of Internal Affairs. The LRA delegation was led by Obonyo Olweny.

53. See H. Mukasa, 'Government, LRA Sign Peace Deal', *Sunday Vision*, 27 August 2006.

54. See 'Under Secretary-General Calls for Greater Security Council Commitment to Ending Conflicts in Democratic Republic of Congo, Northern Uganda', Press Release re Security Council 5525th Meeting, 15 September 2006, pp. 3-4, available at <www.un.org/News/Press/docs/2006/sc8831.doc.htm>.

55. 'Post-conflict amnesty' involves the grant of an amnesty by the government to rebel groups (non-state actors) for crimes committed during an internal armed conflict. This can be distinguished from 'self-excusing amnesties' and 'transitional amnesties'. Self-excusing amnesties are granted by governments for their own human rights violations, for example in Peru. Transitional amnesties are granted by governments for acts committed during the state's previous regime, for example the amnesty granted in South Africa. See, e.g., K. Gallagher, 'No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone', 23 *Thomas Jefferson L Rev.* (2000) p. 149.

56. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 *UNTS* p. 609, entered into force 7 December 1978.

57. See Special Court for Sierra Leone, Separate Opinion of Justice Robertson, *Prosecutor* v. *Allieu Kondewa*, Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lome' Accord, Decision of the Appeals Chamber, SCSL-04-14-T-128-7347, paras. 32-33 (hereinafter Robertson).

or automatically nullifies amnesties in all circumstances.[58] It has been argued that 'criminal prosecutions prolong conflicts and that more flexible restorative measures might be more appropriate in situations involving mass atrocities with thousands of perpetrators'.[59] To this end, amnesties and truth commissions whose primary purpose is addressing and resolving armed conflicts rather than shielding a perpetrator from criminal responsibility, can qualify as valid attempts at 'investigating' crimes.[60] Accordingly, it has been suggested that 'amnesties may be appropriate where the only alternative to an amnesty is a continuance of violence and further human rights violations: in other words, the choice really is between peace, with an amnesty, or justice, but continued violence'.[61] It is, thus, claimed that states can grant amnesties or pardons, even for heinous crimes, in the interest of saving lives, and to induce terrorists or rebels to surrender in reliance upon them.[62] The main justification for amnesty to the LRA rebels is the need to bring the conflict to an end, and achieve peace. This position was restated by Father Carlos Rodriguez of the Acholi Religious Leaders Peace Initiative [ARLPI]: 'nobody can convince the leaders of a rebel movement to come to the negotiating table and at the same time tell them that they will appear in courts to be prosecuted'.[63] In October 2005, the LRA deputy commander Vincent Otti noted that the ICC indictments are the 'only obstacle' to the success of the peace talks.[64] With arrest warrants still valid, Otti stated, signing a peace agreement 'would not be a correct' decision.[65] In this respect, there has been 'strong concern' in Uganda 'that the [ICC] indictments, if not lifted, could threaten the progress in the most promising talks ever'.[66]

Indeed the people of Northern Uganda, who have borne directly the brunt of the armed conflict, have been in the forefront in asking for what Norbert Mao – the chairman of Gulu district, called a 'total and unconditional amnesty' for the LRA/M rebels as a way to end the suffering.[67] Betty Amongi, a Ugandan

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58. Ibid., at para. 47; A. Cassese, *International Criminal Law* (Oxford, Oxford University Press 2003) p. 315.

59. Moy, *supra* n. 50, at p. 272.

60. N. Roht-Ariaza, 'Amnesty and the International Criminal Court', in D. Shelton, ed., *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsley, NY, Transnational Publishers 2000) p. 79.

61. S. Williams, 'Amnesties in International Law: The Experience of the Special Court for Sierra Leone', 5 *Human Rights L Rev.* (2005) pp. 271-309 at p. 295.

62. See Robertson, *supra* n. 57, at para. 23.

63. Quoted in A. Branch, 'International Justice, Local Injustice: The International Criminal Court in Northern Uganda', *Dissent Magazine*, Summer 2004, available at <www.dissentmagazine.org/article/?article=336>.

64. See R. Muhumuza, 'Kony Rebels Refuse to Sign Peace Deal', *Daily Monitor*, 10 October 2006.

65. Ibid.

66. Report of the Under Secretary-General, *supra* n. 54, at pp. 2-3. See also n. 185.

67. IRIN, 'Uganda: Locals Want Rebel Leader Forgiven', Pader, 1 August 2006, available at <www.irinnews.org/report.aspx?reportid=59805>; see also Refugee Law Project, 'Peace First, Jus-

member of parliament, noted that the indictment by the ICC against the LRA's five leaders would not end the conflict in Northern Uganda.[68] She observed that the 'greatest justice to the people who have been suffering for the past 20 years is to have peace'.[69]

Furthermore, it has been noted in the case of the LRA rebels life sentences imposed by the ICC under Article 77 of the ICC Statute would not be a kind of punishment at all. In the words of the chairman of Uganda's Amnesty Commission, Peter Onega:

> 'If you took Kony to the ICC, tried and convicted him, the ICC is going to impose life sentences – they talk in terms of 20, 30 years. A man who has been living in the bush under very difficult and harsh conditions will find conditions very nice in prison where he will be well looked after. For an ordinary Acholi it will not be a kind of punishment at all.'[70]

This view seems to suggest that the purpose of life imprisonment is solely to punish, neglecting other purposes – rehabilitation, deterrence and keeping the community safe. Viewed in this context, it is claimed that granting amnesty to the LRA leaders, and allowing the Acholi traditional reconciliation system to take its course is a better alternative since: 'The amnesty idea [to the LRA] originated in Acholi where the rebels were killing their own people. The people came up with this idea of amnesty and up to now they still uphold the idea of amnesty.'[71] Walter Ochora Odoch, the resident district commissioner of Gulu noted that 'among the Acholi the culture of forgiveness has been there for thousands of years' and thus it can be extended to the LRA leaders to bring an end to the suffering.[72] Since the year 2000, following the failure of the military campaign against the LRA/M, the government of Uganda offered the LRA/M rebels, who renounced rebellion, 'amnesty' – full immunity from prosecution.[73] Bearing this in mind, in July 2006 the Ugandan President Yoweri Museveni stated:

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tice Later', July 2005, available at <www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP17.pdf>; Refugee Law Project, 'Whose Justice? Perceptions of Uganda's Amnesty Act 2000', February 2005 – interviewed 409 individuals and found strong support for giving a blanket amnesty to all LRA, including Kony (available at <www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP15.pdf>.

68. IRIN, 'Uganda: Gov't Ready for Conditional Truce with Rebels', Kampala, 25 August 2006, available at <www.irinnews.org/report.aspx?reportid=60463>.

69. Ibid.

70. IRIN, 'Uganda: Widespread Support for Forgiveness', Gulu, 29 August 2006, available at <www.irinnews.org/report.aspx?reportid=60480>.

71. Ibid.

72. Ibid.

73. See the Amnesty Act 2000, Cap. 294; the Amnesty (Amendment) Act 2006; and R. Murphy, 'Establishing a Precedent in Uganda: The Legitimacy of National Amnesties under the ICC', 3(1) *Eyes on the ICC* (2006) pp. 33-56.

> 'The Ugandan government will grant total amnesty [for the LRA/M combatants including their leader – Kony] despite the ICC indictments if he responds positively to the talks with the government in Juba, southern Sudan, and abandons terrorism.'[74]

The government offered to grant '[a]mnesty to all combatants which shall be guaranteed upon successful conclusion of the talks' and to 'engage the cultural, religious leaders and all stake holders in a bid to reconcile the combatants with their community'.[75] Museveni claimed that the 'noble cause of trying Kony before the ICC had been betrayed by the failure of the UN, which set up the court, to arrest him, despite knowing his location in the DRC's Garamba National Park'.[76] He added that to 'hand over Kony after he has come out him-self, that's out',[77] the only requirement was that 'Kony must apologise'.[78] Museveni further told the GOSS that he will not betray the indicted rebel leader, once a comprehensive peace agreement was signed.[79] This suggests that that amnesty was intended to have domestic, trans-national and international effect. Thus, it was believed that the granting of amnesty was a key factor in getting the rebel leader to pursue the peace option.[80] Following this offer of an amnesty, the LRA/M declared a unilateral cessation of hostilities on 4 August 2006,[81] followed by an agreement signed between the government of Uganda and the LRA/M, to cease hostilities which took effect on 29 August 2006.[82] This was the first formal bilateral agreement between the parties in the two decades of the armed conflict. The peace talks are thus seen to 'offer the best chance to end a twenty-year civil war' while the ICC warrants are considered to be 'a complicating factor'.[83] As the OTP acknowledged

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74. See 'Rebel Leader Kony to Face the Music', *Mail & Guardian on Line*, 12 July 2006.

75. R. Rugunda, 'Govt Position on Kony Peace Talks in Juba', *The New Vision*, 18 July 2006. Uganda's Minister of Internal Affairs, Ruhakana Rugunda, stated: 'Uganda's position is that if Joseph Kony (the LRA leader) respects the truce, we shall convince the ICC not to arrest him.' See F. Ahimbisibwe, 'Uganda to Appeal to ICC for LRA Leaders', *The New Vision*, 30 August 2006.

76. Ibid.

77. Ibid.

78. A. Wasike, 'Kony Must Apologise – Museveni', *The New Vision*, 30 July 2006.

79. G. Matsiko, 'I cannot betray Kony – Museveni', *Daily Monitor*, 16 August 2006.

80. C. Maddux, 'Amnesty Offer for Ugandan Rebel Kony Raises Controversy', *Voice of America*, 1 August 2006.

81. 'LRA Leaders Declare Ceasefire', *BBC News*, 4 August 2006, available at <news.bbc.co.uk/1/hi/world/africa/5243038.stm>.

82. See n. 53 above. The parties agreed 'to cease all hostile military action aimed at each other and any other action that may undermine the Peace Talks'.

83. ICG, 'Peace in Northern Uganda?', *Africa Briefing* No. 41, 13 September 2006, p. 1. The LRA second in command, Vincent Otti, was quoted to have stated in October 2006: 'The ICC is the greatest obstacle in all that I see. And unless they [warrants] are withdrawn, we shall not leave here for anywhere.' See P. Halera, 'LRA's Otti Vows to Kill ICC Captors', *Daily Monitor*, 13 October 2006. Otti further noted that with the ICC international arrest warrant still in place, the government's much-hyped amnesty offer is just a ploy to lure them out of the bush, so that they can be arrested by the ICC. See C. Banya, 'Otti Wants Trial in Uganda', *Sunday Vision*, 15 October 2006.

> 'the ongoing negotiations to end the civil conflict enjoy broad support, and have been carried out in part on the basis of aid from interested States inside and outside the region, as well as UN departments, particularly those with humanitarian mandates, including UN OCHA and UNICEF'.[84]

After signing the agreement Museveni declared: 'That agreement is good for Kony and his group. It gives them a soft landing especially since we have defeated them militarily.'[85] This begs the question: if the LRA/M were defeated militarily, why didn't Uganda – a State Party to the ICC – arrest those indicted by the ICC especially given Museveni's express self-referral of the LRA case to the ICC? The act of granting 'total amnesty' to the LRA/M leaders indicted by the ICC after 'defeating them militarily' suggests that *de facto* Uganda withdrew informally its referral to the ICC, an act not contemplated by the Rome Statute. It follows that President Museveni used the ICC initially to mobilise the international community (especially Sudan) against supporting, or neglecting to take concrete action against, the LRA/M, after failing to apprehend Kony. The use of the ICC was conceived as a better 'strategy for engaging the international community' to arrest and prosecute the top LRA/M leaders without addressing pre-existing grievances in Northern Uganda.[86] Indeed the issuing of the ICC arrest warrants against the LRA/M commanders altered the LRA's calculations and created an incentive for the indicted commanders to negotiate.[87] The ICC's intervention also complicated Sudan's continued support of the LRA, helping sever the LRA's supply lines and uproot their safe havens.[88] Finally, the ICC's case focused international attention on the long overlooked conflict in Northern Uganda (a region in which the major powers have limited interest) and renewed pressure on efforts to end the conflict.[89] Given the history of failed peace efforts, the continued threat of prosecution provides effective leverage to ensure committed engagement by all parties. Since neither the OTP nor the ICC are parties to the Juba talks, even if a comprehensive peace agreement would be concluded with an offer of total amnesty to the LRA rebels, this would not be binding upon the ICC. The ICC should therefore move forward with its prosecutions against the LRA/M leaders even after the parties reach a comprehensive

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84. The Prosecutor's Submission, *supra* n. 18, at para. 32. 'OCHA' is an acronym for the Office for the Coordination of Humanitarian Affairs. 'UNICEF' is an acronym for the United Nations Children's Fund.

85. A. Wasike, 'M7 Warns LRA on Breaking Truce', *The New Vision*, 28 August 2006.

86. Akhavan, *supra* n. 16, at p. 410; A. Di Giovanni, 'The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?', 2 *Journal of International Law & International Relations* (2006) pp. 25-64 at p. 62.

87. A. O'Brien, 'ICC: UN Security Council is Key', *Daily Monitor*, 31 October 2006.

88. Ibid.

89. Ibid.

peace agreement to demonstrate to the world 'that the most serious crimes of concern to the international community as a whole must not go unpunished'.[90]

3.2 Acholi traditional amnesty: *Mato Oput* – an alternative to the ICC?

The Acholi (Luo) traditional reconciliation mechanism is called '*Mato Oput*'.[91] It promotes a model of healing through the culture of non-violence, forgiveness, reconciliation and peace.[92] According to Luo culture, justice cannot be reached without mercy or forgiveness:

> 'When a crime is committed against humanity with impunity, the accused or perpetrator must be the first witness against himself or herself. He/she must stand outside the "Gate of the Village" and tell the people his/her name and names of his/her parents and uncle. He/she also talks about the crime he/she committed and why he/she committed it the way he/she did. After his/her testimony, the elders of the Village immediately take collective responsibility on his/her behalf. After the confession and the culprit's community taking collective responsibility, the elders then perform the rituals of the self-confessed culprit …'[93]

In accordance with this reconciliation mechanism, it was expected that in the event of a peaceful end to the conflict, the government would employ *Mato Oput*, as an alternative to the ICC, where the LRA leaders indicted by the ICC would come at a public ceremony and be required to apologise verbally to the people of Uganda.[94] It was expected that:

> 'Their public apologies shall be subjected to acceptance by religious leaders as witnesses. Thereupon, the two parties shall be required to "bend spears" and formally declare an end to hostilities. They will also be required to drink the juice from the root of the Mato Oput tree as a form of cleansing.'[95]

Uganda's Internal Affairs Minister, Ruhakana Rugunda, claimed that Uganda, like the ICC, 'doesn't encourage impunity' but in the case of the LRA it will

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90. ICC Statute, Preamble, para. 5.

91. *Mato Oput* literally means 'drinking of the bitter root from a common cup'. It is an Acholi traditional ritual performed to cleanse somebody and reconcile him/her with the victims that he/she offended. See Liu Institute for Global Issues, 'Restoring Relationships in Acholiland: Traditional Approaches to Justice and Reconciliation', September 2005, available at <www.ligi.ubc.ca/admin/Information/543/Roco%20Wat%20I%20Acoli-2005.pdf>.

92. B. Ochola, 'The Acholi Traditional Justice Enough for Kony', *Sunday Vision*, 27 August 2006; J. Muto, 'Acholi Prefer Mato Oput to ICC for Kony rebels', *Daily Monitor*, 3 October 2006.

93. Ibid.

94. E. Gyezaho, 'Govt Briefs Donors on Kony Peacetalks', *Daily Monitor*, 1 August 2006.

95. Ibid.

use 'alternative justice, *Mato Oput*, which is used elsewhere in Africa but called other names'.[96] But will this traditional mechanism deliver justice to the victims? Since *Mato Oput* is an Acholi traditional reconciliation mechanism, would the LRA/M victims in other parts of Uganda (such as Lango, Teso, and parts of Karamoja) – whose justice systems include punishments such as expulsion from the community, and the withdrawal of all protection from the individual – accept *Mato Oput*? If not, is it necessary to integrate other traditional mechanisms of reconciliation and accountability from other affected communities? Given the fact that the crimes committed in Northern Uganda were against the international community as a whole, would the traditional mechanism meet the minimum international requirements for accountability in accordance with Uganda's international treaty obligations? More specifically, would the key individuals be held accountable by a competent, independent and impartial tribunal? Would the individuals accused enjoy due process rights including information about allegations against them, and an opportunity to defend themselves? According to Luo culture, 'once one accepts responsibility for crimes against humanity, the victim community has no option but to forgive'.[97] Thus individuals are compelled to admit having committed crimes in order to obtain forgiveness. *Mato Oput* does not adequately take into account the views of the individual victims who might not wish to forgive the commission of serious crimes. In addition, it does not require the perpetrators to be punished or pay adequate material compensation to the victims.

Clearly then, *Mato Oput* is not part of a system aimed at bringing the persons concerned to justice, but a form of blanket amnesty reflecting a traditional attempt to shield perpetrators from justice. *Mato Oput* (in its current form) would not necessarily be enough to satisfy international law, which does not allow impunity for the most serious crimes. This means that it is not possible under *Mato Oput* to punish those responsible for the crimes and accordingly it is not possible to bring to justice the perpetrators, organisers and sponsors of the crimes against humanity. It is also difficult to prevent and eradicate the commission of future crimes, since those responsible for commanding directly the commission of such crimes would not be held accountable. The Ugandan government preference for this form of amnesty was intended, at least in part, to promote peace and stability in the region, a strategy meant partly to win political support from a region that has never fully backed President Yoweri Museveni in his more than 20 years in power.[98]

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96. H. Mukasa, 'Rugunda Explains Otti Phone Call', *Sunday Vision*, 27 August 2006.

97. Ochola, *supra* n. 92. See also C. Rodrigue, 'What is Mato Oput?', *The Weekly Observer*, 28 September 2006, noting that 'mato oput was designed for simple, clean-cut cases … Can it also work in a complicated situation involving thousands of offenders – often unknown – who have committed lots of atrocities, cutting across different clans?'

98. In the three presidential elections held since President Museveni became the President of Uganda in 1986, most voters in Northern Uganda (especially in Lango and Acholi) have consis-

4. CASE AGAINST AMNESTY

Several academics and human rights organisations have argued against amnesty for the LRA/M leaders indicted by the ICC.[99] The main reasons against granting amnesty (without an effective form of accountability) for international crimes are considered below.

Amnesty promotes a culture of impunity in which violence remains the norm rather than the exception yet international law rejects impunity for serious crimes, such as genocide, war crimes, and crimes against humanity.[100] The SC reaffirmed 'that persons who commit or authorise serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice'.[101] On 27 January 2006, in Resolution 1653, the SC strongly condemned specifically the LRA and other armed groups operating in the Great Lakes region,[102] and urged 'all States concerned to take action to bring to justice perpetrators of grave violations of human rights and international humanitarian law'.[103] Impunity for such crimes is generally incompatible with the obligations of the states to respect and protect human rights.[104] A rule that precludes impunity would require some form of an effective accountability mechanism (such as criminal prosecution, a truth commission or other transitional mechanism) to consider the violations that have occurred, so that perpetrators are brought to account.[105] International treaties ratified by Uganda – including the International Covenant on Civil and Political Rights (ICCPR),[106] the Convention against Torture and Other Cruel, Inhuman or Degrading Treat-

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tently voted overwhelmingly against President Museveni in 1996, 2001 and 2006. At a national level President Museveni's support has declined 'from 75% in 1996, to 69% in 2001 and now 59% in 2006'. See S. Nganda, 'Besigye Support Worries Museveni', *Weekly Observer*, 30 November 2006.

99. See, e.g., F. Ssekandi, 'Should the ICC Drop Charges on LRA's Joseph Kony?', *The New Vision Discussion Board*, 21 July 2006, available at <www.newvision.co.ug/B/D/532/1>; HRW, 'Uganda: No Amnesty for Atrocities', New York, 28 July 2006, available at <hrw.org/english/docs/2006/07/27/uganda13863.htm>; AI, *supra* n. 25.

100. See UN Commission on Human Rights, Resolution 2002/79, para. 2 'recognizes that amnesties should not be granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes'; The Princeton Principles on Universal Jurisdiction (2001), Principle 7; ICC Statute, Arts. 5-8; L. Sadat, 'Exile, Amnesty and International Law', 81 *Notre Dame L Rev.* (2006) pp. 955-1036.

101. Preamble, SC Res. 1315 (2000) (on establishment of a Special Court for Sierra Leone), 14 August 2000.

102. See also SC Res. 1663 (2006), 24 March 2006, p. 2, paras. 7-8.

103. SC Res. 1653 (2006), 27 January 2006, p. 3, para. 6.

104. HRC, *Rodríguez* v. *Uruguay*, Communication No. 322/1988, UN Doc. CCPR/C/51/D/322/1988 (1994), para. 12.4.

105. Williams, *supra* n. 61, at p. 293.

106. UN Doc. A/6316 (1966), 999 *UNTS* p. 171, entered into force for Uganda on 21 September 1995.

ment or Punishment (CAT),[107] the Geneva Conventions, and the ICC Statute – require States Parties to ensure that alleged perpetrators of serious crimes are prosecuted.[108] In this context the Human Rights Committee (HRC) has confirmed that allegations of torture:

> 'must be investigated promptly and impartially by competent authorities so as to make the remedy effective …
> The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.'[109]

Article 2(1) of the CAT states: 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.' This Article obliges states to protect individuals from 'severe pain or suffering' intentionally inflicted by 'public officials' for such purposes as obtaining information or a confession or punishment for an act committed.[110] In addition, since torture is 'the most serious violation of the human right to personal integrity and dignity',[111] and can be committed by both states and non-state actors (NSAs) like armed rebel movements, states must also protect individuals against torture by NSAs who are not public officials.[112] In accordance with this obligation, Uganda must:

> 'take vigorous steps to eliminate the impunity of the alleged perpetrators of acts of torture and ill-treatment [including the LRA leaders], carry out prompt, impartial and exhaustive investigations, try and, where appropriate, convict the perpetrators of torture and ill-treatment, impose appropriate sentences on them and properly compensate the victims'.[113]

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107. UN Doc. A/39/51 (1984). Uganda acceded to this Convention on 3 November 1986.

108. ICC Statute, Preamble, para. 7: 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.

109. HRC, General Comment 20, UN Doc. HRI\GEN\1\Rev.1 at 30 (1994) paras. 14-15. See also the Report of the Committee against Torture, UN Doc. A/55/44 (2000), para. 61(d).

110. See CAT, Art. 1(1); *Dragan Dimitrijevic* v. *Serbia and Montenegro*, Communication No. 207/2002, UN Doc. CAT/C/33/D/207/2002 (2004); *Jovica Dimitrov* v. *Serbia and Montenegro*, Communication No. 171/2000, UN Doc. CAT/C/34/D/171/2000 (2005); *Danilo Dimitrijevic* v. *Serbia and Montenegro*, Communication No. 172/2000, UN Doc. CAT/C/35/D/172/2000 (2005).

111. M. Nowak, 'What Practices Constitute Torture?: US and UN Standards', 28 *Human Rights Quarterly* (2006) pp. 809-841 at p. 839.

112. See, e.g., European Court of Human Rights, *HLR* v. *France* (1997) 26 *EHRR*, para. 40; *A.* v. *United Kingdom* (1999) 27 *EHRR* 611; *Z. and Others* v. *United Kingdom* (2002) 34 *EHRR* 97, para. 73.

113. Committee against Torture, Conclusions and Recommendations: Uganda, UN Doc. CAT/C/CR/34/UGA (2005) para. 10(g).

Since the Rome Statute obliges the Court under Article 21(3) to apply and interpret the law applicable to the ICC in conformity with 'internationally recognized human rights', it is preferred to consider 'total amnesty', without alternative forms of effective accountability, as inconsistent with the object and purpose of the Rome Statute – 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes' and 'to guarantee lasting respect for and the enforcement of international justice'.[114] It is useful to consider the question whether a decision to prosecute can be rescinded after the grant of 'total amnesty' to the LRA/M leaders indicted by the ICC? The answer would seem to be in the negative. Article 53 of the ICC Statute states the circumstances under which the Prosecutor may discontinue proceedings as follows:

> '2. if, upon investigation, the prosecutor concludes that there is not a sufficient basis for a prosecution because:
> (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;[115]
> (b) The case is inadmissible under article 17;[116] or
> (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;
> The Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.
> 3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.
> (b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.
> 4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.'

Despite the language of Article 53, the decision to discontinue a prosecution by the ICC Prosecutor for which a warrant has already been issued is limited to cases where the Prosecutor has made an independent determination that in all

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114. ICC Statute, Preamble, paras. 6 and 12.

115. Art. 58(1) provides: 'At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if … it is satisfied that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; …'

116. Under Art. 17(1) a case is inadmissible, *inter alia*, if it is being genuinely investigated or prosecuted by a state which has jurisdiction over it or the case is not of sufficient gravity to justify further action by the Court.

circumstances the prosecution cannot be successfully continued on the evidence or that the case is inadmissible by virtue of Article 17, or because the state making the referral has assumed jurisdiction to prosecute the accused genuinely.[117] The fact that the referral-state has granted a total amnesty resulting in impunity is a political and not legal ground to justify discontinuation of the prosecution even though it may be expedient as a means of achieving a peaceful settlement. On the basis of the above reasoning the only body with the power to terminate proceedings on political ground is the Security Council (SC) under Article 16.[118] This Article permits the SC to determine that an agreement would be in the interests of 'peace' or 'justice' and to require the ICC by a Chapter VII resolution to defer action for renewable one-year periods. The SC has already recognised that the LRA poses a threat to regional peace and stability.[119] In January 2006, the SC strongly condemned the activities of the LRA/M and reiterated its demand that they 'lay down their arms and engage voluntarily and without any delay or preconditions in their disarmament and in their repatriation and resettlement'.[120] This decision suggests that the SC may request the ICC to 'suspend' prosecution of the LRA leaders if this is in the interests of peace. The prosecutions would be suspended, not stopped, and could be resumed if there was a breach of the peace agreement.

There are precedents to support the view that an amnesty cannot be extended to shield authors of serious human rights violations or against charges involving crimes against humanity. First, the HRC confirmed in *Rodríguez* v. *Uruguay* that 'amnesties for gross violations of human rights … are incompatible with the obligations of the State party under the Covenant [ICCPR]'.[121] In this communication, Hugo Rodríguez, a Uruguayan citizen was subjected to torture by the authorities of the then military régime in Uruguay. Before the HRC, Uruguay limited itself to justify, in *general* terms, the Uruguayan government's decision to adopt an amnesty law. The Uruguayan parliament had enacted, on 22 December 1986, Law No. 15,848, the Limitations Act or Law of Expiry (*Ley de Caducidad de la Pretensión Punitiva del Estado*) which effectively provided for the immediate end of judicial investigation into such matters and made impossible the pursuit of this category of crimes committed during the years of

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117. Ssekandi, *supra* n. 99.

118. ICC Statute, Art. 16: 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.'

119. See SC Res. 1653 (2006), 27 January 2006, and 1663 (2006), 24 March 2006.

120. SC Res. 1653 (2006), 27 January 2006, para. 8.

121. *Rodríguez* v. *Uruguay*, *supra* n. 104, at para. 12.4. See also HRC, *Basilio Laureano Atachahua* v. *Peru*, Communication No. 540/1993, UN Doc. CCPR/C/56/D/540/1993 (1996), para. 10. The HRC urged 'the State party to open a proper investigation into the disappearance of Ana Rosario Celis Laureano and her fate, to provide for appropriate compensation to the victim and her family, and to bring to justice those responsible for her disappearance, notwithstanding any domestic amnesty legislation to the contrary'.

military rule. The HRC found that 'the facts as submitted sustain a finding that the military régime in Uruguay violated article 7 of the Covenant' (para. 12.1). The Committee also found that 'the adoption of Law No. 15,848 and subsequent practice in Uruguay have rendered the realisation of the author's right to an adequate remedy extremely difficult' (para. 12.2). The Committee reaffirmed its position:

> '[A]mnesties for gross violations of human rights and legislation such as the Law No. 15,848,[122] are incompatible with the obligations of the State party under the Covenant. The Committee notes with deep concern that the adoption of this law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses. Moreover, the Committee is concerned that, in adopting this law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations.'[123]

Secondly, the Special Court for Sierra Leone has upheld a similar view in the *Prosecutor* v. *Kallo*n, and *Prosecutor* v. *Kamara*.[124] In that case the Appeals Chamber faced with a challenge of its jurisdiction to try the accused who claimed benefit from an amnesty granted by the Sierra Leone government under the Lomé Agreement, ruled that any state has the sovereign right to grant amnesty to rebels for 'acts of rebellion and challenge to the constitutional authority of the State'.[125] However, '[i]t is where, and in this case because, the conduct of the participants in the armed conflict is alleged to amount to international crime that the question arises whether in such a situation a State has the same choice to dispense with the prosecution of the alleged offenders'.[126] The Appeals Chamber in effect declared that Sierra Leone could not legally declare an amnesty for 'crimes under international law that are the subject of universal jurisdiction'.[127] It continued: '[I]t stands to reason that a state cannot sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*.'[128] The Special Court endorsed the argument of the Prosecutor that there is a 'crystallizing international norm that a government cannot grant amnesty for serious

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122. *Ley de Caducidad de la Pretensión Punitiva del Estado*.

123. Ibid., at para. 12.4. See also HRC, Concluding Observations: Peru, CCPR/CO/70/PER (15 November 2000), para. 9; Haiti, CCPR/C/79/Add.49, A/50/40 (3 October 1995), para. 230.

124. *Prosecutor* v. *Kallon*, Case No. SCSL-2003-07-PT, 16 June 2003; *Prosecutor* v. *Kamara*, Case No. SCLS-2003-10-PT, 16 June 2003.

125. Ibid., at para. 20.

126. Ibid.

127. Ibid., at para. 71.

128. Ibid.

violations of crimes under international law'.[129] Furthermore, citing Orentlicher, who had filed an *amicus curiae* brief, the Appeals Chamber stated 'the grant of amnesty … is not only incompatible with, but is in breach of an obligation of the State towards the international community as a whole'.[130] Apparently Orentlicher, as well as the NGO Redress, which also intervened before the Appeals Chamber, had invoked the existence of treaty obligations requiring states to try and extradite for certain crimes. While it has been argued that the above view displayed 'confusion by the Appeals Chamber about the distinction between treaty obligations and customary international law',[131] the position of the Appeals Chamber is in line with the position taken by the UN as outlined by the Secretary-General when presenting the Lomé Agreement to the Security Council, which also led his representative at the conference to register a dissent to the amnesty provision.[132]

In contrast, however, the Truth and Reconciliation Commission of Sierra Leone took a more pragmatic position and upheld the use of the amnesty in some circumstances as a practical means of achieving a peaceful settlement in case of a civil conflict. In its Report, the Commission stated:

> '[T]hose who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of an armed conflict. … The Commission also recognizes the principle that it is generally desirable to prosecute perpetrators of serious human rights abuses, particularly when they rise to the level of gravity of crimes against humanity. However amnesties should not be excluded entirely from the mechanisms available to those attempting to negotiate a cessation of hostilities after periods of brutal armed conflict. Disallowing amnesty in all cases is to deny the on-ground reality of violent conflict and the urgent need to bring such strife and suffering to an end.'[133]

Given the gravity of the crimes committed by the LRA/M – for example, the LRA attack on Barlonyo Internally Displaced Persons camp in Lira, North Eastern Uganda, leading to 337 civilian deaths –[134] it is not only desirable but also essential to prosecute the perpetrators. This is necessary 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the

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129. Ibid., at para. 82.

130. Ibid., at para. 74.

131. W. Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone', 11 *University of California, Davis Journal of International Law and Policy* (2004) pp. 145-169 at p. 162.

132. See 'Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone', UN Doc. S/2000/915 (2000), paras. 22-23: 'The United Nations interprets that the amnesty and pardon … shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international law.'

133. Report of the Sierra Leone Truth and Reconciliation Commission, October 2004, ch. 3, p. 362.

134. Ssenyonjo, *supra* n. 10, at p. 406.

prevention of such crimes'.[135] Indeed enforcing the ICC arrest warrants would send a powerful signal to the LRA/M leaders and generally around the world that those most responsible for crimes against humanity around the world will be held accountable for their actions notwithstanding national amnesties. In any case, international tribunals have consistently held that in the event of conflict between international obligations and national law, the international obligations prevail.[136] In this respect, Uganda's international obligations under the ICC Statute would prevail over national amnesty law and practice particularly in dealing with the crimes against humanity.[137]

Furthermore, 'total amnesties' are in direct violation of the Constitutive Act of the African Union (AU),[138] which expressly includes among its principles the 'condemnation and rejection of impunity'.[139] Although the AU supports the 'peaceful resolution of conflicts among Member States',[140] Article 4(m) of its Constitutive Act states that the AU shall function in accordance with the principle of 'respect for democratic principles, human rights, the rule of law and good governance'. Thus, peaceful resolution of armed conflicts must take into account human rights obligations including those relating to effective accountability mechanisms to ensure that rights are respected, and where they are not, that victims can find redress. This is so because 'rights and obligations demand accountability: unless supported by a system of accountability, they can become no more than window-dressing'.[141] The recognition of a state's obligation to respect and guarantee human rights protected by the African Charter on Human and Peoples' Rights (ACHPR),[142] includes the duty not only to prevent, investigate and punish violations of these rights, but also the obligation to organise all state organs involved in the exercise of public power in such a way that they can 'promote and protect human and peoples' rights'.[143]

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135. ICC Statute, Preamble, para. 6. See also W. Punyasena, 'Conflict Prevention and the International Criminal Court: Deterrence in a Changing World', 14 *Michigan State JIL* (2006) pp. 40-57 at p. 57 stating that 'the threat of ICC prosecution in particular situations may have an ultimate deterrent effect, reducing hostilities and providing greater accountability worldwide'.

136. See E. Denza, 'The Relationship Between International and National Law', in M. Evans, ed., *International Law*, 2nd edn. (Oxford, Oxford University Press 2006) pp. 423-448 at p. 425.

137. Argentina offers a good example, Argentina's Supreme Court (in a 7-1 vote, with one abstention), held in June 2005 that two amnesty laws, adopted in the late 1980s in order to shield authors of serious human rights violations committed during the so-called 'Dirty War' (1976-1983), were unconstitutional and void. The Court confirmed the precedence of international law (human rights principles) over national law in dealing with the most serious crimes against humanity. See *Case of Julio Héctor Simon* (14 June 2005); C. Bakker, 'A Full Stop to Amnesty in Argentina: The Simon Case', 3 *Journal of International Criminal Justice* (2005) pp. 1106-1120.

138. OAU Doc. CAB/LEG/23.15, entered into force 26 May 2001.

139. Ibid., Art. 4(o).

140. Ibid., Art. 4(e).

141. Committee on Economic Social and Cultural Rights, 'Poverty and the International Covenant on Economic, Social and Cultural Rights', E/C.12/2001/10, 4 May 2001, para. 14.

142. OAU Doc. CAB/LEG/67/3 rev. 5, 21 *ILM* (1982) p. 58, entered into force 21 October 1986.

143. Constitutive Act of the African Union, Preamble, para. 9.

The recent precedents in Africa for granting amnesty suggest that it is not a bar to accountability. For example, Sierra Leone's rebel leader, Foday Saybana Sankoh,[144] whose forces committed widespread atrocities, was offered an amnesty and even appointed as the vice president,[145] but he was finally arrested, and indicted by the Special Court for Sierra Leone for crimes against humanity.[146] Similarly, the former president of Liberia, Charles Taylor, was indicted by the UN-backed Special Court for Sierra Leone – an international war crimes court – but was subsequently offered asylum in Nigeria. That asylum turned out to be only temporary after international pressure was put on Nigeria to hand Taylor over.[147] The former Liberian leader is now charged by the Special Court for Sierra Leone for war crimes, crimes against humanity, and other serious violations of international humanitarian law (use of child soldiers) in the course of Sierra Leone's 11-year armed conflict.[148]

In addition, although some contend that justice should be sacrificed for peace, there is no conclusive evidence to sustain the view that such impunity measures bring sustainable peace. In Sierra Leone, the Lomé amnesty for crimes under international law failed to prevent violence.[149] In Northern Uganda, an existing amnesty law (between 2000 to 2005) failed to stop crimes or to bring about peace.[150] It is only after the LRA leaders were indicted by the ICC that an agreement on cessation of hostilities was concluded. It remains to be seen whether the August 2006 cessation of hostilities agreement – between the LRA/M rebels and the Ugandan government – in exchange for 'total amnesty' would bring about sustainable peace in Northern Uganda without an effective accountability mechanism for those most responsible for the crimes committed. The fact that the amnesty offer did not lead the majority of the LRA rebels to assemble in the designated areas suggests that amnesty without accountability may not be effective.[151] In contrast, the example of the former Yugoslavia demonstrates that justice can co-exist with peace initiatives, as reflected in the Dayton Agreement, and can even promote peace through establishing (international criminal) accountability to deter future

144. Sankoh was a leader of the Sierra Leone rebel faction RUF, notorious for brutal practices such as mass rapes and amputations during the armed conflict.

145. M. Doyle, 'Africa's Mixed Amnesty Precedents', *BBC News*, 4 July 2006, available at <news.bbc.co.uk/1/hi/world/africa/5148226.stm>.

146. Indictment Case No. SCSL-03-I, *The Prosecutor* v. *Foday Saybana Sankoh*, available at <www.sc-sl.org/Documents/SCSL-03-02-I-001.html>.

147. See HRW, 'Prompt Action to Ensure Taylor's Surrender Needed', 26 January 2006, available at <hrw.org/english/docs/2006/01/26/liberi12538.htm>.

148. HRW, 'Trying Charles Taylor in The Hague: Making Justice Accessible to Those Most Affected', June 2006, available at <www.hrw.org/backgrounder/ij/ij0606/ij0606.pdf>.

149. AI, *supra* n. 25.

150. Ibid.

151. F. Ahimbisibwe, 'LRA War Resumes', *The New Vision*, 3 October 2006; IRIN, 'Uganda: Monitoring Team Finds No Rebels at Assembly Area', 3 October 2006, available at <www.irinnews.org/report.aspx?reportid=61242>.

crimes.[152] Therefore accountability for war crimes, crimes against humanity, and justice for the victims of such violations comprises a strong foundation upon which peace and stability are built and sustainable.

Finally, the LRA/M leader – Joseph Kony – has denied the ICC charges and claimed:

> 'It is Museveni who is oppressing the Acholi people and driving the villagers into camps. Our wealth, our property, was destroyed by Museveni. He want[s] to destroy all Acholi so that the land of Acholi will be his land … I did not kill the civilian of Uganda. I kill the soldier of Museveni.'[153]

This defence suggests that there is no need for amnesty because the alleged crimes against civilians are denied. Since Joseph Kony and the other commanders identified in the ICC arrest warrants claim innocence, it is essential to come forward to the ICC and respond to the counts formally.[154] In turn the ICC should guarantee their safe passage to The Hague, and they should be given every opportunity and facility to present their case before an independent judicial body with the highest guarantees of the due process.[155]

5. CONCLUSION: REINFORCING ACCOUNTABILITY

While the amnesty (for children abducted by the LRA rebels and forced to commit crimes) is a useful tool of negotiating a peaceful end to the 20-year armed conflict in Northern Uganda, such amnesty should not be used to shield the LRA/M leaders/commanders indicted by the ICC, who bear the greatest responsibility for the crimes committed, from prosecution for international crimes. This would be consistent with the principle that prosecution should focus on persons responsible for the most serious crimes.[156] This is because the impunity perpetuated by such amnesty and freedom from punishment to those most responsible for serious crimes is manifestly incompatible with the object and purpose of the ICC Statute, and this would be a tool allowing perpetrators to escape responsibility for crimes or a process aimed at furthering accountability.[157] Therefore, those leaders who have committed or ordered the commission of atrocities, and indicted by the ICC in the long-standing armed

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152. Ibid.

153. S. Farmar, 'Uganda Rebel Leader Breaks Silence', *BBC News*, 28 June 2006, available at <news.bbc.co.uk/2/hi/programmes/newsnight/5124762.stm>.

154. The OTP has issued public statements inviting the named individuals to come forward to the ICC and respond to the charges. See, e.g., 'Kony Offered Free Passage to Hague', *Daily Monitor*, 30 June 2006; 'NewsNight Talks', *BBC News Broadcast*, 28 June 2006.

155. Ibid.

156. ICTY Statute, Arts. 1 and 7(1); ICTR Statute, Art. 1; ICC Statute, Art. 1.

157. G.K. Young, 'Amnesty and Accountability', 35 *UC Davis L Rev.* (2002) p. 427 at p. 482.

conflict should be held accountable for their deeds. Joseph Kony admitted in July 2006 that 'I have many children [in the camps] who were abducted',[158] and further admitted that 'some of the atrocities … reported … were committed by the LRA'.[159] According to some analysts, at the time of writing, no group in the world deserved 'the term terrorist organisation more than the LRA'.[160] As such, the failure to prosecute the LRA/M leaders by granting them amnesty aimed at shielding them from criminal trial would amount to a failure to 'bring terrorists to justice' contrary to SC resolution 1373 (2001) adopted on 28 September 2001 under Chapter VII of the UN Charter. This resolution requires that states 'deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens', and 'ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or is supporting terrorist acts is brought to justice'. The best way then to finally stop the crimes committed in the course of the armed conflict after 2 decades is to arrest and prosecute the LRA/M top leaders after the conclusion of the comprehensive peace agreement. This means that the ICC Prosecutor can integrate justice into peace by delaying an investigation or prosecution, if it is in 'the interests of victims' so as not to interfere with the likely peace process.[161] In this way peace and justice wouldn't be in contradiction but mutually reinforcing each other.

Although the LRA commanders had not been arrested (at the time of writing), it was clear that the ICC arrest warrants against the LRA's leadership had already had a significant impact. The warrants have focused international attention to the conflict and brought additional pressure upon the LRA to engage in the current peace negotiations. For example, Sudan, a non-state party to the ICC Statute who had harbored the LRA in the past, 'voluntarily' signed an *ad hoc* agreement with the ICC committing itself to execute the warrants against the LRA commanders.[162] Due to the escalating international and regional pressure, the LRA commanders have been forced to flee their former Sudan safe havens for the DRC jungles and to negotiate a political deal since May 2006,[163] leading to the conclusion of an agreement on the cessation of hostilities and

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158. IRIN, 'Sudan-Uganda: LRA Child Abductees Cry for Home', *supra* n. 11.

159. IRIN, 'Uganda: Government, Rebels to Resume Talks in Sudan', Nabanga, 2 August 2006, available at <www.irinnews.org/report.aspx?reportid=60001>.

160. P. Nyanzi, 'German MPs Oppose LRA Impunity', *Sunday Monitor*, 18 June 2006.

161. Moreno-Ocampo, *supra* n. 33, at pp. 497-503; ICC Statute, Art. 53(2). A 2006 Survey revealed that a majority of Ugandans, at least 96 percent, are opposed to any other means of ending the conflict other than peace. See A. Atuhaire, '96% Ugandans Reject War Over Kony Rebels', *Daily Monitor*, 14 October 2006.

162. L. Moreno-Ocampo, 'Sudan to Execute Kony Arrest Warrant – ICC', *Daily Monitor*, 12 June 2006. Under Art. 87(5)(b) of the ICC Statute: 'Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties …'

163. IRIN, 'Uganda: LRA Rebels Ready to Talk Peace – Joseph Kony', Kampala, 25 May 2006, available at <www.irinnews.org/report.aspx?reportid=59108>.

the assembly of some of the LRA rebels at the neutral encampment designated as an assembly point for rebels.[164] As a result, the LRA attacks in Northern Uganda and their ability to commit further crimes have declined dramatically.[165] However, their ability to re-organize and commit further crimes should not be under estimated.[166] Joseph Kony has categorically stated that the LRA shall resume their 'normal activities in case the government plans to jeopardise the peace talks'.[167] As noted in the Secretary-General's June 2006 report to the SC the LRA should continue to be regarded 'as a threat to regional peace', because, among other things, it has 'a proven ability to regroup and continue committing atrocities', and because its presence at the borders of the DRC, Uganda and Southern Sudan presents 'a real threat to the rule of law and adds to the existing security problems in the Great Lakes region'.[168]

The challenge now is to arrest the LRA/M commanders indicted by the ICC after the conclusion of the comprehensive peace agreement and surrender them to the ICC. At the very minimum, States Parties to the ICC Statute (or to human rights treaties such as the ICCPR) should not contribute to an atmosphere of impunity which may undermine the democratic order.[169] As noted above, amnesties are generally incompatible with the duty of states to investigate acts of gross human rights violations; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.[170] Amnesty offers also lead to the defencelessness of the victims by denying them a right to an effective remedy before an impartial and independent court.

Since the LRA remains a regional problem, its elimination requires greater regional cooperation and sustained support from the international community to resolve. Thus arresting the indicted LRA/M leaders is not only a challenge for Uganda, Sudan or the DRC, but also a challenge for the international community, especially the more than 100 States Parties to the ICC Statute. The ICC efforts to render justice will help to restore peace in Uganda and provide a

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164. H. Mukasa, '1,604 LRA Assemble as Deadline Closes', *The New Vision*, 17 September 2006.

165. See the Prosecutor's Submission, *supra* n. 18, at para. 11: 'The number and severity of LRA attacks in Northern Uganda, which were already at their lowest level in years at the time the warrants were first made public, continued to decline following issuance of the warrants. Violence in Northern Uganda decreased as LRA fighters moved into Sudan and then the DRC, and crimes attributed to LRA have nearly ceased following the implementation of a Cessation of Hostilities Agreement signed by the LRA and the Government of Uganda, in August 2006, as part of the current peace negotiations.'

166. See ibid., at para. 14 for a list of the LRA's recent strategic and deadly operations in Uganda, the DRC, and Southern Sudan.

167. P. Okino, 'Kony Vows to Fight On', *The New Vision*, 1 December 2006.

168. 'Report of the Secretary-General pursuant to Resolutions 1653 (2006) and 1663 (2006)', UN Doc. S/2006/478 (2006), paras. 5, 7, available at <daccessdds.un.org/doc/UNDOC/GEN/N06/415/40/PDF/N0641540.pdf?OpenElement>.

169. *Rodríguez* v. *Uruguay*, *supra* n. 104.

170. General Comment 20, *supra* n. 109, at para. 15.

precedent to other states. In this respect justice and peace can continue to work together.[171] In order to achieve this, states parties to the ICC and other human rights treaties should continue to speak out strongly against amnesty to the senior leaders of the LRA for war crimes and crimes against humanity.[172] In addition, all other actors including the UN (in light of the United Nations Mission in the DRC (MONUC) and UN peacekeeping forces in Southern Sudan (UNMIS) on the ground in the DRC and Sudan, respectively) should pay more attention to the arrest of individuals indicted by the ICC and any other persons for whom the Court issues arrest warrants.[173] In Resolution 1663, adopted on 24 March 2006, in addressing the situation in Sudan, the SC extended the mandate of UNMIS, 'strongly condemn[ed] the activities of militias and armed groups such as the Lord's Resistance Army', and sought proposals from the Secretary-General on 'how UN agencies and missions, in particular UNMIS, could more effectively address the problem of the LRA'.[174]

The ICC warrants are but a crucial first step in a long and difficult justice and accountability process since the ICC cannot prosecute every single perpetrator or investigate crimes committed before July 2002. Accordingly other states are also urged to exercise universal jurisdiction over other persons suspected of crimes under international law in Northern Uganda, investigating them and, if there is sufficient evidence, prosecuting them in their courts since 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[175]

In particular, the Ugandan government as a State Party to the ICC has a primary duty not to undermine, through amnesty, *Mato Oput* or other means, the ICC arrest warrants. The ICC is not a political tool of any government but 'an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole'.[176] Although amnesty in some form has been used with varying levels of success in some African conflicts – including Mozambique, Angola, and post-apartheid South Africa – to give amnesty to individuals indicted by the ICC over the most serious crimes of concern to the international community as a whole would compromise the effectiveness of the ICC and bring questions about whether the ICC can really carry out its mandate.

While post-conflict reconciliation should be taken into account, true and durable reconciliation can't be brought about by perpetuation of impunity. The fact that the LRA leaders indicted by the ICC under go *Mato Oput* or complete

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171. ICC, 'Statement by the Chief Prosecutor Luis Moreno-Ocampo', The Hague, 12 July 2006, available at <www.icc-cpi.int/pressrelease_details&id=167&l=en.html>.

172. HRW, *supra* n. 99.

173. AI, *supra* n. 25.

174. SC Res. 1663 (2006), 24 March 2006, p. 2, paras. 7-8.

175. ICC Statute, Preamble, para. 7.

176. ICC Statute, Preamble, para. 10.

another truth and reconciliation procedure does not necessarily absolve them from criminal responsibility before the ICC since only genuine criminal trials bar ICC proceedings under the principle of *ne bis in idem*.[177] In this respect, Uganda as a State Party to the Rome Statute must refrain from the unilateral withdrawal of the ICC arrest warrants since the self-referral (following the ratification of the Rome Statute) waived Uganda's right to enforce its amnesty against those indicted by the ICC.[178] There is no mechanism in the Rome Statute enabling a state unilaterally to revoke a referral or force the Court to close a case. Notwithstanding the domestic amnesty offer, the ICC by virtue of Articles 17 and 19 of the Rome Statute remains the 'final arbiter' over the interpretation of issues of jurisdiction and admissibility.[179]

To this end, the ICC may use its own criteria to determine whether or not an offer of 'total amnesty' or other alternative forms of justice (such as *Mato Oput* or another mechanism along the lines of a Truth and Reconciliation Commission) are compatible with the Rome Statute taking into account 'applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'.[180] Where warrants have been issued under the Rome Statute, states are obliged to 'comply with requests for arrest and surrender'.[181] The offer of 'total amnesty' indicates that a state will not willingly comply with the requests for arrest and surrender of those indicted by the ICC. Since the ICC is dependent on state cooperation rather than any ICC-directed police or military force, to effectuate arrest, Uganda could in effect terminate the investigation by refusing to cooperate with the Court, though this could result in a judicial ruling of non-compliance and referral of the matter to the Assembly of State Parties.[182] With no access to witnesses, evidence, or indictees, the ICC would have difficulty proceeding. As noted by the ICC President in October 2006, Judge Philippe Kirsch in the second annual Report of the ICC to the United Nations General Assembly:

> 'Our experience over the past year has reinforced the importance of cooperation to the Court … the Court has arrest warrants [against the LRA leaders] outstanding.

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177. ICC Statute, Art. 17(1)(c) provides that a case is inadmissible where a 'person concerned has already been tried for conduct which is the subject of the complaint'. Art. 20(1) states: 'Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.'

178. Under Art. 12 of the ICC Statute: 'A State which becomes a Party to this [ICC] Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.' In order to domesticate the ICC Statute into Ugandan law, parliament should enact the International Criminal Court Bill 2006 into national law.

179. C. Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the ICC', 3 *Journal of International Criminal Justice* (2005) pp. 1-26 at p. 6.

180. ICC Statute, Art. 21.

181. ICC Statute, Art. 89(1).

182. ICC Statute, Art. 87(7).

> The Court does not have the power to arrest these persons. That is the responsibility of States and other actors. Without arrests, there can be no trials.'[183]

Although it has been stated that the 'commitment of the [Ugandan] Government to cooperate with, and support the Court remains unchanged since [the date of the referral]',[184] it is not clear how this commitment will be reconciled with the offer of 'total amnesty'. The alleged commitment is not supported by concrete action to that effect and it is doubtable whether it reflects genuine willingness to cooperate regarding the execution of the warrants. In the words of the chairman of the Uganda government's negotiating team in Juba and minister of internal affairs, Ruhakana Rugunda:

> 'We have sent information to the LRA top leadership through credible messengers like Norbert Mao [Gulu Chairman], Owiny Dolo [the former minister of state for foreign affairs], and Walter Ochora [Gulu RDC] to tell Kony that *the government cannot arrest him and his commanders.*'[185]

On the face of it, the above statement indicates clearly the government's unwillingness to arrest the LRA leaders indicted by the ICC. As argued above, the offer of domestic amnesty to the most responsible perpetrators, without an effective alternative form of accountability satisfactory to the ICC, cannot provide immunity from prosecution for war crimes and crimes against humanity by an international tribunal.[186] Therefore, the LRA rebels demand that 'to come out, the ICC must revoke the indictment' must be ignored.[187] At the time of writing, the Juba negotiations between the Ugandan government and the LRA were at an early stage and thus it was premature to predict the outcome. Since the ICC is an independent legal institution with a mandate to prosecute, not to make political decisions, the burden of making the decision to suspend the investigation should be shouldered by the SC. This is because the SC is charged by the UN Charter to maintain international peace and security,[188] and delegated the authority to suspend the ICC's investigations for renewable

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183. Judge Philippe Kirsch, 'Address to the United Nations General Assembly', 9 October 2006, available at <www.icc-cpi.int/library/organs/presidency/PK_20061009_en.pdf>.

184. See Government of Uganda Letter dated 4 October 2006 signed by the Solicitor General of Uganda in response to a request from the ICC Registrar following the ICC Chamber's 15 September 2006 Order; E. Gyezaho, 'Govt Still Wants ICC to Arrest Kony, Otti', *Daily Monitor*, 11 October 2006.

185. Y. Mugerwa, 'MPs Attack Govt over Kony's ICC Arrest Warrants', *Daily Monitor*, 4 December 2006 (emphasis added).

186. See also Y. Naqvi, 'Amnesty for War Crimes: Defining the Limits of International Recognition', 85 *International Review of the Red Cross* (2003) No. 851 pp. 583-624 at p. 593; Stahn, *supra* n. 179, at p. 4.

187. R. Muhumuza, 'Talks in Trouble as LRA Makes U-Turn', *Daily Monitor*, 6 September 2006.

188. Charter of the United Nations, 26 June 1945, 3 *Bevans* 1153, <www.un.org/aboutun/charter/>, Ch. VII, Art. 39.

12-month periods in the interests of peace under Article 16 of the Rome Statute. Therefore, if a deal has to be done to bring peace to Northern Uganda, the least worst option might be a resolution by the SC requesting the ICC to suspend its prosecution and asylum for the indicted LRA commanders in a state not party to the Rome Statute, conditioned on their full compliance with the peace agreement.[189] However, the question is, which state is willing to offer them asylum? While finding a receptive state (if some LRA/M combatants prefer third country asylum) will be a sensitive and difficult task, the LRA Second-in-Command, Vincent Otti, stated in November 2006 that 'asylum is impossible. I would rather stay in the bush with all my forces all through my life'.[190] In January 2007, the president of Sudan Omar El-Bashir stated:

> 'We are prepared to constitute a joint force to eliminate the LRA. We do not want them. If we cannot find a peaceful solution to the LRA conflict, then we must pursue a military solution.'[191]

Following this statement, the LRA leadership claimed that the mediators '[Dr Riek] Machar and the government of Southern Sudan are not impartial'.[192] They gave two conditions for a return to the negotiations: a new chief mediator to replace Dr Riek Machar,[193] and a neutral venue outside Sudan, preferably Kenya or South Africa.[194] This demand, however, was rejected by the Ugandan government on the basis that 'geographically and politically, Juba remains the best venue for the talks'.[195] It was argued that the move would lead to 'unacceptable delays' as the new mediators would first need to study the problem.[196] This has raised uncertainty over the peace talks and the amnesty. This development demands that the Ugandan government, the rebel LRA and the international community should continue to work toward a peace agreement that respects human rights, and includes prosecutions of those responsible for war crimes and crimes against humanity in accordance with international law standards.

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189. ICG, *supra* n. 83.

190. F. Nyakairu, 'Kony, Otti Cross to Ri-Kwangba', *Daily Monitor*, 19 November 2006.

191. IRIN, 'Sudan-Uganda: LRA Rebels Should Leave Sudanese Territory – Bashir', 10 January 2007, available at <www.irinnews.org/report.aspx?reportid=63029>.

192. C. Akena, 'Museveni not Interested in Peace Talks, Says Kony', *Sunday Monitor*, 28 January 2006.

193. The LRA/M alleged that the mediator Dr Riek Machar, who was also South Sudan Vice-President, was biased in favour of the Ugandan government.

194. G. Matsiko, 'LRA Quit Juba Talks, Govt Rejects Rebels' Demands', *Sunday Monitor*, 21 January 2007; IRIN, 'Sudan-Uganda: Rebel Delegation Quits Talks, Seeks "Neutral" Venue', 12 January 2007, available at <www.irinnews.org/report.aspx?reportid=64301>.

195. IRIN, 'Uganda: Displaced Civilians Still Scared of Rebels, Says Gov't', 24 January 2007, available at <www.irinnews.org/report.aspx?reportid=64550>.

196. See Vision Reporter, 'Museveni Insists on Juba', *The New Vision*, 4 February 2007.