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

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INTRODUCTION

In December 2003, the President of Uganda, Yoweri Museveni, invited the Prosecutor of the International Criminal Court (ICC) to investigate the commission of serious international crimes by the Lord’s Resistance Army (LRA). The referral followed almost two decades of conflict between Ugandan army and LRA forces, several failed peace negotiations, and offers of domestic amnesty to the rebels. Interestingly, Uganda’s self-referral and the consequent threat of arrest, detention and trial at the ICC, has apparently produced a new willingness on the part of the LRA leadership to negotiate peace. As a precursor to signing a comprehensive peace agreement, the rebels agreed to submit to domestic accountability processes if the ICC warrants are dropped. In 2007 and 2008, the Government and rebels concluded two important Agreements which called for domestic accountability for the LRA’s crimes through the establishment of a national court to try alleged perpetrators of serious international crimes.\(^1\) With the conclusion of these two Agreements to enable domestic criminal prosecutions, questions arise about the continued admissibility of the LRA case before the ICC.

This article discusses the impact of the domestic political and legal

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\(^{1}\) Agreement Between the Government of Uganda and the Lord’s Resistance Army on Accountability and Reconciliation, June 29, 2007; Annexure to the Agreement on Accountability and Reconciliation, Feb. 19, 2008.
developments on the admissibility of the LRA case. It challenges the suitability of a formal textual approach to determining admissibility, and suggests that given the delicate legal and political context of the Ugandan situation, it would be inappropriate to base the forum choice exclusively on the strict letter of the ICC Statute.

In essence, given the competing claims of advocates of “peace without justice” and “justice without peace,” the article posits that a strict retributive justice approach is unsuitable for the Uganda situation. The article does not aim to rekindle the age-old debate that posits “peace” and “justice” as polar opposites. However, to set the stage for the ensuing discussion regarding the most appropriate forum to try the LRA leadership, the article recognises that it would be untenable to pursue justice in its Western, international incarnation regardless of the wishes and aspirations of the people most directly affected by the Ugandan internal conflict.

In effect, the views of the people of Uganda, especially victims from the Acholi community in the North of the country, regarding the various means by which those allegedly responsible for the most serious crimes in Northern Uganda could be held accountable, must be taken seriously. For example, the argument that traditional accountability processes may be more suitable for communal reconciliation and a lasting peace, should not be lightly ignored or set aside. After all, it can hardly be denied that the best form of ‘justice’ for a population that has been subjected to over two decades of brutal violence is peace—a peace that enables them to return to their homes, to resume farming for the food they eat, to rear their animals, to bring up their children, and to make day-to-day choices in life as a dignified people. To insist on justice at the ICC irrespective of how that might impact efforts to find a durable peace in Uganda, risks defeating the goals of both peace and justice. Therefore, I suggest that a decision on the most appropriate forum for the LRA trial must not only be informed by the legal and moral imperatives to try Joseph Kony and the other LRA leaders given the serious crimes for which they have been accused and the high levels of victimization in Northern Uganda, but also take into account how the forum choice might affect other goals such as peace, victim participation in the justice process, deterrence and increased perceptions of the

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3 *Id.* at 819–20. In this context, the retributive justice claim is based on the argument that those who commit crime deserve punishment as a moral imperative or that the ICC has an institutional mandate to prosecute perpetrators of serious international crimes.
legitimacy of the trial.

The article therefore suggests a consequentialist approach\(^4\) to the question of forum choice. It concludes that, in theory, Uganda-based trials offer the best prospect of attaining both peace and justice. However, I also recognise that this option will remain illusory unless Uganda overcomes its two-decade long inability to arrest or peacefully convince the LRA leadership to surrender. In addition, if and when the issue of Kony’s custody is resolved, and Uganda chooses to embark on a domestic accountability process, the country must do more to bring about genuine and credible prosecutions that meet international standards.

The remainder of this article is organized as follows: Part I provides background necessary to understanding the Ugandan referral to the ICC and Part II discusses the law and jurisprudence on complementarity and admissibility under the Rome Statute. In Part III, I discuss the legal developments in Uganda that are relevant to a future domestic trial of the LRA leadership; Part IV makes arguments in support of domestic prosecution of the LRA given the equally important goals of justice and peace; Part V teases out lessons from the referral jurisprudence of the United Nations International Criminal Tribunal for Rwanda (UN-ICTR) that could arguably guide Uganda’s national trials of the LRA; Part VI sets out procedural options available to Uganda under the Rome system of justice if the country wishes to challenge the admissibility of the LRA case before the ICC; and Part VII makes a few concluding remarks.

I. FACTUAL CONTEXT OF THE REFERRAL

Uganda’s self referral under Articles 13(a) and 14 of the Rome Statute of the International Criminal Court invited the ICC Prosecutor to investigate serious international crimes committed by the LRA during the country’s twenty year old internal armed conflict.\(^5\) In July 2004, Prosecutor Luis

\(^4\) For a discussion of consequentialist and retributive justice claims in the context of the LRA case, see Blumenson, supra note 2, at 824–32. See also J. Alex Little, Balancing Accountability and Victim Autonomy at the International Criminal Court, 38 GEO. J. INT’L L. 363, at 393: “Retributive justice is hardly universal. Many tradition-based systems of justice such as *gacaca* in Rwanda and *mato oput* in Uganda, depart from the retributive model and instead prioritize confessions and forgiveness.”

Moreno-Ocampo determined that a reasonable basis existed to open an investigation into the situation in Northern Uganda and in May 2005, he applied to the Pre-Trial Chamber for arrest warrants against five top leaders of the LRA. The warrants, which were issued in September 2005 and made public the following month, charged Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya with multiple counts of crimes against humanity and war crimes. These include murder, rape, pillage, enslavement, sexual slavery, cruel treatment, enlisting children in armed conflict, and attacks against the civilian population.

Uganda’s referral, however, did not prevent it from pursuing a parallel peace process. This was due to the fact that a sizeable part of the victim population in Northern Uganda, including religious and traditional leaders as well as members of Parliament, had expressed the view that the ICC referral could give further impetus to reprisal attacks by the LRA against those perceived to support the government in Kampala. In addition, the government’s peace initiative was a realistic acknowledgement of its inability to arrest Joseph Kony and the LRA leadership for close to two decades. A comprehensive peace agreement that would lead to the voluntary surrender of the LRA, was therefore deemed a viable option, especially when combined with processes for domestic accountability.

ICC Statute remains a contested one. Akhavan suggests that despite the complementarity principle, nothing in the Rome Statute or its negotiating history prohibits such referrals and notes that there may be domestic circumstances that justify exceptional recourse to the ICC. See Payam Akhavan, The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court, 99 Am. J. Int’l L. 403, at 414–15. On the other hand, Arsanjani and Reisman argue that during the Rome Treaty negotiations, no one envisaged the possibility that governments would want to invite the Court to investigate and prosecute crimes that occurred on their territory and therefore no provision was made to cover this eventuality. See M.H. Arsanjani & W.M. Reisman, The Law-in-Action of the International Criminal Court, 99 Am. J. Int’l L. 385, at 387–88. However, the practice of the ICC pre-trial Chamber has endorsed the legality self-referrals from three African countries—Uganda, Democratic Republic of Congo and the Central African Republic.


Given these considerations, in 2007 and 2008, the Government and the LRA adopted two important agreements which provide for national trials of war-related crimes rather than trial at the ICC. Following the conclusion of these Agreements, several Ugandan government officials, including President Museveni, suggested the LRA case would no longer be admissible at the ICC, that Kony will be tried in Uganda, and that the Government can ask the ICC to withdraw the arrest warrants. However, as discussed in detail below, this argument was perhaps predicated on Uganda’s misunderstanding of the operation of the complementarity principle, under which, the ICC is only empowered to prosecute international crimes within its jurisdiction if the relevant national system is not doing so.

In the next part of this article, I will discuss the principle of complementarity and the admissibility regime governing cases under the Rome Statute. This will be followed by an analysis of the impact of the 2007 Agreement on Accountability and Reconciliation and its Annexure of 2008 on the admissibility of the LRA case before the ICC.

II. COMPLEMENTARITY AND ADMISSIBILITY UNDER THE ROME STATUTE

Under the Rome Statute, the cornerstone of the relational architecture between the ICC and State Parties is the principle of complementarity set out in the Preamble and stipulated in Article 1. Unlike the ad hoc Tribunals for Rwanda and the former Yugoslavia which enjoy primary jurisdiction to try serious international crimes enumerated in their respective statutes, the

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8 Manisuli Ssenyonjo, Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court, 10 J. CONFLICT & SECURITY L. 405, at 425 (2005), where President Museveni is quoted to have said “If we told the ICC that we have found an internal solution, they would be happy.” The President is further reported to have stated that if the LRA were to stop fighting and “engage in internal reconciliation mechanisms put in place by the Acholi community such as mataput or blood settlement, … the State could withdraw its case [in the ICC].” As discussed below, Uganda’s ability to withdraw its referral to the ICC is a legally contested proposition.

9 The Preamble to the ICC Statute recognizes the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, and emphasizes that the ICC shall be complementary to national criminal jurisdictions. Article 1 establishes the ICC as a permanent institution with jurisdiction over persons for the most serious crimes of international concern, which shall be complementary to national criminal jurisdictions.

10 Article 8 of the ICTR Statute provides: “(1) The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.”

“2. The International Tribunal for Rwanda shall have the (sic) primacy over the
treaty establishing the ICC places on State Parties the primary responsibility to try perpetrators of crimes falling within the Court’s subject-matter jurisdiction. According to the ICC’s Pre-Trial Chamber, complementarity is the cornerstone of the Statute and it is the principle that reconciles “the States’ persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes.” Consequently, the ICC only possesses “add on,” “last resort” or “fall back” jurisdiction, which is triggered where the admissibility criteria under the Statute are satisfied. Therefore, complementarity operates as a mediating principle to resolve tensions arising from the interplay of domestic and international criminal jurisdictions under the Rome system of justice.

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

Article 17, the governing provision, stipulates a negative condition, i.e.,


12 Darryl Robinson, The Mysterious Mysteriousness of Complementarity, 21 CRIM. L.F. 67–102 (2010); D. Goldstone, Embracing Impasse: Admissibility, Prosecutorial Discretion, and the Lessons of Uganda for the International Criminal Court, 22 EMORY I.L.R. 761, at 785; Akhavan, supra note 5, at 414 (“An ordinary interpretation of Articles 17(1) (a) and (b) indicates that unwillingness or inability is relevant only when a state has investigated or prosecuted a case; where it has not done so, there is no express requirement of establishing unwillingness or inability as a precondition for the exercise of jurisdiction.”). Contra N. Norris, Closer to Justice: Transferring Cases from the International Criminal Court, 19 MINN. J. INT’L L. 201, at 219 (2010); Arsanjani & Reisman, supra note 5, at 389–91; William Schabas, Prosecutorial Discretion v. Judicial Activism at the International Criminal Court, 6 J.I.C.J. 731, at 737 (2008), arguing that “the two prongs of the complementarity test are well known, even to non-specialists: the state must be ‘unwilling or unable genuinely’ to investigate or prosecute.”
circumstances when a case will be “inadmissible” before the Court. The article expressly recalls the principle of complementarity, and then lists four separate grounds of inadmissibility as follows: (i) the fact that a case is being investigated or prosecuted by a State, “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”; (ii) a state has investigated or prosecuted a case and decided not to prosecute, “unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute”; (iii) the person has been tried for the same conduct for which a complaint has been made to the ICC and a subsequent trial will violate the non bis in idem rule; and (iv) the case is not of sufficient gravity to be tried by the Court.

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

The standard of admissibility under the Rome Statute therefore consists of a two-stage test. The Pre-Trial Chamber must first consider whether national proceedings (in the form of an investigation or prosecution) are taking place. If the answer to this question is negative, then there is no bar

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13 Article 17(1) provides as follows:

Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

(a) The case 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;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

14 Decision on Admissibility, supra note 11, at para. 36.

15 Robinson, supra note 12, arguing that the drafting history of Article 17 supports the
to admissibility. However, where there are national proceedings, then the second, qualitative assessment becomes relevant in determining an admissibility challenge. In carrying out the latter assessment, the Pre-Trial Judges will examine whether: (i) the national proceedings are being held to shield particular individuals from responsibility; (ii) they lack independence or impartiality or; (iii) there has been inordinate delay which reveals the intent not to prosecute the person(s) concerned. Similarly, a State will be found unable to prosecute where its judicial system has totally or substantially collapsed, where it fails to arrest the accused, to secure evidence or witnesses for trial. In other words, despite primacy, sham proceedings at the national level are insufficient to render a case inadmissible before the ICC.

As a general matter, one could argue that since Uganda referred the LRA case to the ICC in the exercise of its sovereign rights, there should be little or no debate about its cooperation with the Court or indeed the appropriate forum for the LRA trial. However, as mentioned earlier, political and legal developments in Uganda since the self-referral have interpretation that “national proceedings” must entail an investigation or prosecution.

16 A good example of national proceedings held to shield particular perpetrators from justice or that lack independence or impartiality is Sudan’s establishment of a Special Criminal Court to purportedly try crimes committed in Darfur. The fact that Sudan announced the establishment of the Court a day after the ICC Prosecutor’s announcement of his intention to open investigations into the Darfur situation, convinced many that the real objective of Sudan’s announcement was to oust the ICC’s jurisdiction. See Alhagi Marong, “Outlaws on Camelback”: State and Individual Responsibility for Serious Violations of International Law in Darfur, ISS Paper 136, Pretoria (Apr. 2007). See also Human Rights Watch, Lack of Conviction: the Special Criminal Court on the Events in Darfur” (June 2006); and Human Rights Watch, Entrenching Impunity: Government Responsibility for International Crimes in Darfur” (Dec. 2005).

17 In the PTC’s Admissibility Decision, supra, note 11, it noted Uganda’s submission that for almost two decades, the country had been unable to secure the arrest of Kony and others allegedly bearing the greatest responsibility for the crimes committed in Northern Uganda, and that this was one of the reasons why the government supported their trial at the ICC. See para. 37 of the Decision on Admissibility.

18 See Rome Statute, Article 17(2). See also Arsanjani & Reisman, supra note 5, at 395, where they argue that there is no evidence that Uganda’s national judicial system had totally or substantially collapsed and further noting that the government’s inability to arrest the accused or conduct investigations in the North has nothing to do with the national judicial system. While I agree with Arsanjani and Reisman that Uganda’s judicial system has not collapsed and therefore this cannot be a reason for the LRA case to be admitted to the ICC, the fact that the Government has been unable to arrest the LRA leaders for over twenty-years is relevant to the admissibility of the case pursuant to the express terms of the Rome Treaty.
raised various questions, including the Government’s willingness to cooperate with the ICC; whether there is a legal basis for Uganda to withdraw or claw back on the self-referral;¹⁹ and most significantly, whether considering the advances in peace negotiations and the adoption of at least two agreements on domestic accountability between the Government and LRA rebels, there is reason for the ICC to defer to Ugandan jurisdiction - at least for the time being.

III. LEGAL DEVELOPMENTS IN UGANDA

A. The Agreement on Accountability and Reconciliation and Its Annexure

As already noted, despite its referral to the ICC, the Ugandan Government did not give up on the peace process. In November 2004, the Government announced a unilateral ceasefire and invited the LRA to negotiate peace. However, the talks collapsed the following month.²⁰ Fresh talks opened in July 2006 and led to the successful negotiation of all agenda items.²¹ Given this relative success in peace talks, some have suggested that the only seeming obstacle to a final peace deal is the ICC warrants.²² While it is hard to substantiate this, in view of the years of hostilities and the atmosphere of mutual suspicion between the Parties, the fact remains that

¹⁹ The Rome Statute provides for the possibility that a state with jurisdiction may challenge the admissibility of a case. Under Article 19(2)(b), a State with jurisdiction over the case may challenge admissibility on the ground that it is investigating or prosecuting the case, or has already done so. However, under Article 19(5), such a challenge must be made “at the earliest opportunity.” The Statute therefore provides for both ex ante (i.e., before completion of domestic proceedings) and ex post (i.e., after domestic proceedings), challenges to admissibility at the ICC. For Uganda, it is clear that there is no basis for an ex ante challenge given the fact that there are no domestic proceedings regarding the LRA case. The question of whether Uganda can bring an admissibility challenge after it conducts domestic proceedings, is addressed later in the paper.

²⁰ Apuuli, ICC Arrest Warrants, supra note 5, at 183.

²¹ Apuuli, ICC’s Deferral to Uganda, supra note 5, at 804, where he explains that the negotiating Parties reached agreement on all the agenda items including cessation of hostilities, comprehensive solutions to the conflict, accountability and reconciliation, a formal ceasefire, and disarmament, demobilization and reintegration.

²² Id. at 804–05, quoting Vincent Otti, Deputy Leader of the LRA, in the following terms:

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

The apparent chilling effect of the ICC arrest warrants on the peace process has prompted many people to call for the ICC to disengage from Uganda and for the Government to seek alternative accountability options at the national level. A wide array of domestic constituencies, including Members of Parliament from Northern Uganda, religious and community leaders, civil society organizations, and government officials have called for a reversal of the ICC process, and in its place, for the adoption of a combination of criminal proceedings and traditional justice approaches at the national level to deal with war-related crimes. It must be emphasized that these domestic voices do not call for impunity for the LRA; rather, recognizing the current impasse over the peace process, they seek alternative accountability mechanisms that could contribute to the realization of both peace and justice.

The ground swell of popular opinion for domestic accountability, instead of ICC-based trials, provided both the context for and explains the provisions of the Agreement and Annexure. The Agreement expresses commitment to the principle of complementarity and is premised upon the twin objectives of accountability and reconciliation through “national legal arrangements.” It calls for both formal justice (criminal trials) and alternative justice mechanisms, especially traditional practices such as mato oput. The Agreement is unclear about the category of perpetrators who will face formal as opposed to traditional justice, but provides that the formal justice mechanisms shall apply to perpetrators of “serious crimes or human rights violations.” It also states that the formal courts shall have jurisdiction over persons who “bear particular responsibility for the most

23 Apuuli, ICC’s Deferral to Uganda, supra note 5, at 805.


25 Id.

26 See Agreement on Accountability and Reconciliation, June 29, 2007, Preamble and Article 2.1 (emphasis added).

27 See Article 3.1, which calls for the promotion of “traditional justice mechanisms” practiced in the communities affected by the conflict as a central part of the framework for accountability and reconciliation.

28 Article 4.1.
serious crimes, especially crimes amounting to international crimes …”  

These provisions may suggest Uganda’s awareness that perpetrators of serious international crimes, or those holding particular positions of leadership such that they are presumed to bear the greatest responsibility for serious violations, must face criminal prosecution rather than other forms of accountability. However, the Agreement does not state so explicitly.

It therefore remains to be seen how Ugandan prosecutors and judges will interpret this provision. Nonetheless, one would hope that this requirement reflects the international legal standards of those “bearing the greatest responsibility,” or “those most responsible” for the perpetration of serious crimes. If this interpretation is adopted, it is likely that Joseph Kony and the LRA leadership will have to face formal criminal proceedings before the Ugandan courts.

However, the legal situation remains unclear, and Uganda missed the opportunity to settle the division of labour between the formal and traditional justice mechanisms when it concluded the 2008 Annexure. In fact, the Annexure seems to introduce further confusion by providing that serious crimes will be tried by “the Special Division of the High Court, traditional justice mechanisms; and any other alternative justice mechanism established under the [2007] Agreement.”  

Neither the Agreement nor the Annexure defines “serious crimes,” but both consistently refer to formal and traditional justice processes as ways of securing accountability for the crimes committed during the conflict. The Agreement and Annexure therefore remain ambiguous at best on the question of a domestic accountability forum for the LRA. However, this could be a constructive ambiguity by Uganda, with the hope that the LRA would be attracted by either the option of a domestic, rather than international trial on the one hand, or traditional justice mechanisms with their focus on reconciliation and forgiveness, rather than punishment, on the other. The relevant traditional justice approaches that are recognised include Mato Oput, Kayo Cuk, Ailuc, Tonu ci Koka and Okukaraba.

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29 Article 6.1.

30 Annexure to the Agreement on Accountability and Reconciliation, Articles 7 & 23.

31 See Article 3.1 of the Agreement and Article 21 of the Annexure. All of these traditional justice approaches place emphasis on admissions, forgiveness, compensation and reconciliation, rather than punishment. See, for example, Kimberly Hanlon, Peace or Justice: Now that Peace is Being Negotiated in Uganda Will the ICC Still Pursue Justice?, 14 TULSA J. COMP. & INT’L L. 295, at 306 (2007), stating, inter alia, that mato oput requires that the perpetrator of the crime admit wrongdoing to the victim, ask forgiveness, and pay compensation. However, I must observe that there is little basis in logic or culture
In 2009, the ICC Pre-Trial Chamber considered the effect of the Agreement and Annexure on the admissibility of the LRA case. The Court invited observations from the ICC Prosecutor, Uganda, the Representative of Victims and received *amicis curiae* briefs on the issue of admissibility. In his submissions, the ICC Prosecutor told the Court that the case remained admissible because there were no national proceedings in Uganda, and noted that the question of admissibility was neither determined by ongoing peace negotiations, nor the adoption of the Agreement and Annexure. Similarly, Uganda submitted that the case was admissible because the coming into force of the domestic legal processes provided for in the Agreement and Annexure, were conditioned upon the LRA’s signature of a comprehensive peace agreement. Since the LRA had not signed any such peace deal, Uganda held the view that the Agreement and Annexure had “no legal force.”

The Pre-Trial Chamber found that the case was admissible despite the existence of the Agreement and Annexure. In doing so, the Chamber clarified that pursuant to Article 17 of the Rome Statute, once the jurisdiction of the Court is triggered, it is the Chamber, not national authorities, which has the exclusive authority to determine the question of admissibility in any given case. This pronouncement removes all doubt about Uganda’s perceived unilateral power or ability to withdraw or claw back on its referral. Simply stated, ICC law does not permit such withdrawals. It was necessary for the Chamber to address and clarify this point because Uganda had made ambiguous submissions regarding the relationship of the ICC and the Special War Crimes Division—the domestic for some of Hanlon’s other sweeping statements such as that “Africans do not understand the Western logic for finding justice. They see lawyers as clever people duelling before a judge, trying to outsmart each other, while avoiding exposing the truth about their client.” Misleading as it is, Hanlon’s statement must have been intended for a largely Western audience. Yet, most informed Westerners would themselves balk at the idea that in the 21st century, “Africans” writ large, do not understand the idea of Western justice. The simple uncontested fact that the large majority of African countries have adopted and applied those very Western standards of justice for many decades, contests, if not fully belies, Hanlon’s proposition. Rather than failing to understand justice in its Western incarnation, Africans have, since independence from Europe, operated pluralist legal systems under which both Western law and traditional African custom play distinct but complementary roles.

32 Decision on the Admissibility, supra note 11.

33 *Id.*, para. 5.

34 *Id.*, para. 8.

35 *Id.*, para. 45.
court envisaged under the Agreement and Annexure.\textsuperscript{36} In addition, the Chamber stated, in \textit{obiter}, that complementarity is the cornerstone of the Rome Statute and that it is the principle that reconciles the States’ persisting duty to exercise jurisdiction over international crimes with the establishment of the ICC with jurisdiction over the same crimes. It added that admissibility is the criterion by which to determine whether it is for a national jurisdiction or the ICC to proceed with a specific case.\textsuperscript{37} Furthermore, the PTC held that in order for a case to be inadmissible before the Court, national proceedings must encompass both the person and the conduct which is the subject of the case before the ICC.\textsuperscript{38}

On the specific question of the admissibility of the LRA case, the Pre-Trial Chamber noted that at the time of its Decision, various institutional and legal developments were taking place in Uganda. However, since those developments could not be qualified as “domestic proceedings,” they could not bar admissibility. The Pre-Trial Chamber added that since the Statute permitted “multiple determinations” of admissibility, it would be possible for Uganda or any of the parties to bring a future admissibility challenge on the ground that new facts or circumstances had arisen in Uganda, including domestic proceedings.\textsuperscript{39}

\textbf{B. The International Criminal Court Act}

In March 2010, the Ugandan Parliament passed the International Criminal Court Bill. The Bill received Presidential assent on 25 May 2010 and entered into force a month later.\textsuperscript{40} Uganda’s ICC Act provides, \textit{inter alia}, for the trial and punishment of genocide, crimes against humanity and war crimes; for Uganda’s cooperation with the ICC in the investigation, arrest, detention and surrender of persons wanted or convicted by the Court; for ICC trials to be held in Uganda; and for the enforcement of sentences. The Act also grants privileges and immunities necessary for the ICC’s work in Uganda.

\textsuperscript{36} In response to the PTC’s request for observations on the admissibility of the case, Uganda had submitted, \textit{inter alia}, that the Special Division “is not meant to supplant the work of the International Criminal Court” and that individuals for whom a warrant has been issued by the latter, “will have to be brought before the special division of the High Court for trial.” See Uganda’s First Response, ICC-02/04-01/05-286-Anx2, at 3.

\textsuperscript{37} Decision on Admissibility, \textit{supra} note 11, para. 34.

\textsuperscript{38} \textit{Ibid.}, para. 17.

\textsuperscript{39} Decision on Admissibility \textit{supra} note 11, paras. 25–29.

\textsuperscript{40} The International Criminal Court Act 2010, \textsc{Uganda Gazette} No. 39 Vol. CIII, June 25, 2010.
The ICC Act domesticates Uganda’s obligations under the Rome Statute. It allows Uganda to undertake the national legal steps necessary to implement its Rome treaty obligations regarding the investigation, arrest and transfer, prosecution and punishment of persons before the ICC. As far as determining a forum choice for the LRA trial is concerned, one consequence of the ICC Act would be to require Uganda to hand over the LRA leadership to the ICC Prosecutor although their trial following such transfer, could notionally take place either in Kampala or at The Hague.

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

In regards to traditional justice, it is clear that the various mechanisms recognised by the Agreement and Annexure have formed an important fabric of local culture and society in Northern Uganda over many generations. From that perspective, they have an inherently legitimate character as instruments of dispute settlement, reconciliation and social harmony at the local level. Therefore, whichever way one looks at it, traditional justice has to form part of the panoply of accountability options with which to address the crimes committed in Uganda. However, given traditional justice’s emphasis on forgiveness, reconciliation and compensation rather than punishment, it must be combined with other methods of accountability such as national trials and truth and reconciliation commissions, all of which should meet certain standards under international law and the Rome Statute.\(^{41}\) This point is addressed further below.

The first option would be for Uganda to adopt a parallel accountability process whereby Kony and the other leaders for whom arrest warrants have

been issued by the ICC will be tried at the Special High Court Division for crimes against humanity and war crimes based on internationally recognised standards. If convicted, these LRA leaders must face prison terms consistent with the sanctions regime under the ICC Statute. Alongside these trials, lower-level perpetrators falling outside the leadership category, or whose crimes are not particularly grave, could be subjected to traditional justice processes. This option has the merit of preserving the interests of those who advocate for both peace and justice within Uganda’s domestic judiciary.

The second option is for those ostensibly bearing the greatest responsibility for crimes committed in Northern Uganda, including Kony and his rebel leadership, to be tried at the ICC. This would be consistent with the ICC Prosecutor’s policy, as well as the expectations that have arisen since Uganda’s self-referral in 2003. Perpetrators falling outside this leadership category could be tried by Ugandan domestic courts such as the Special High Court Division.

Thirdly, a further division of labour would be to subject the lowest level perpetrators such as former child soldiers who might have committed crimes against their own communities or families to traditional justice processes or a truth and reconciliation commission. This approach would be particularly suitable in a situation like Uganda where the line between perpetrators and victims is often blurred.

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

**IV. THE CASE FOR UGANDA-BASED TRIALS**

In light of the current impasse over the final peace agreement and the ICC Pre-Trial Chamber’s position that the LRA case remains admissible before the ICC, are there good reasons to suggest that Uganda-based trials hold the best promise for achieving both peace and justice? The inability of the parties to reach a final peace settlement means that war-ravaged Ugandans continue to face an unsettling political situation. Similarly, the
theoretical existence of various accountability options when viewed in the light of the inability to arrest Kony, implies that the ICC warrants have become the proverbial “Sword of Damocles” hanging, as it were, not only over the head of the LRA, but also over the entire peace process. Unfortunately trapped in between a group of brutal rebels and the political elite, is the victim population of Northern Uganda who helplessly continue to suffer the effects of over two decades of inexplicable violence. This is particularly true of the Acholi ethnic group, whose sentiments remain understandably divided over the issue. It is Acholi children who, in the main, have been forcibly abducted and turned into child soldiers by the LRA. Therefore, while many Acholi would like to see some form of accountability for Kony and his henchmen, they would also want to see a peaceful resolution of the conflict so that their sons and daughters can return home.\textsuperscript{42} This is just one illustration of the complex interplay of interests and factors that require careful consideration in dealing with the LRA case.

There is a strong body of public opinion in Uganda in support of national trials for the LRA as a price for peace. In other words, Ugandans are not advocating impunity for the rebel leadership; however, as the people most directly affected by the conflict, they prefer that the quest for justice must be appropriately timed so as not to defeat the prospects for peace. It has been reported that the majority of Members of Parliament from Northern Uganda hold the view that the ICC warrants should be dropped in favour of traditional justice mechanisms.\textsuperscript{43} Similarly, leading figures such as Betty Bigombe (a former Minister in Museveni’s government and long-time peace negotiator); the head of the Uganda Amnesty Commission; as well as religious leaders from Northern Uganda, including the Acholi Religious Leaders Peace Initiative, have all expressed concern that the arrest warrants could adversely affect chances of a negotiated settlement, and dissuade the rebels from responding to a final peace initiative.\textsuperscript{44} Moreover, traditional Acholi leaders, from whose community the LRA draws most of its members, but who also constitute the largest population of victims of the LRA’s crimes, have made no secret about their preference for traditional justice and reconciliation over the ICC process. Rwot Onen David Acana II, Paramount Chief of the Acholi, is quoted as saying that “the best way to resolve the … war in our region is through \textit{poro lok ki mato oput} (peace talks and reconciliation) as it’s the Acholi culture…” The

\textsuperscript{42} Keller, \textit{supra} note 24, at 224.

\textsuperscript{43} Apuuli, \textit{ICC’s Deferral to Uganda, supra} note 5, at 805.

\textsuperscript{44} Moy, \textit{supra} note 44, at 269–70; also Keller, \textit{supra} note 24, at 217.
Acholi do not buy their idea of taking [Kony] to court.”

During his visit to Northern Uganda in 2006, then United Nations Under Secretary-General for Humanitarian Affairs, Jan Egeland, noted that most stakeholders in the Ugandan peace process felt that the ICC warrants “should be dropped against the LRA leaders so that a peaceful conclusion to the talks can be reached.”

In addition, there are compelling criminal justice arguments in favour of national trials. It is uncontroversial that most of the LRA’s crimes were committed in Uganda, the victims and perpetrators are Ugandan, and almost all the potential witnesses and forensic evidence is to be found in that country. Therefore, both from the point of view of traditional international law and the complementarity regime of the Rome Statute, Uganda’s jurisdiction to try the LRA is unquestionable. Moreover, it is clear that investigations and trial management will be less cumbersome, more cost effective, and hopefully speedier if the trials were held in Uganda.

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

45 Goldstone, supra note 12, at 774. See also Little, supra note 4, at 367 (noting that “Firstly, when victims oppose prosecution, their safety and that of the community might not be improved by a blanket policy that favors prosecution. Secondly, Prosecutors send mixed messages when they proceed with prosecution against victims’ wishes. The constructive signal of accountability often is paired with destructive portrayals of uncooperative victims as weak, irrational, or helpless.”) He concludes that “although prosecution can impose significant costs on individual victims and victimised communities, this risk may be necessary to ensure that grave crimes never again are committed with impunity.” Clearly Little favors aggressive prosecution on the basis of its deterrent potential. Unfortunately, as experience has shown, it is hard to empirically prove that aggressive prosecution always leads to deterrence. In the context of Uganda, the question is not so much whether to prosecute Kony and the LRA leaders, but where such prosecution should take place—within traditional society, in national courts, or at the ICC?

46 A. Greenawalt, Complementarity in Crisis: Uganda, Alternative Justice and The International Criminal Court, 50 Va. J. Int’l L. 107, at 116 (2009). See also Arsanjani & Reisman, supra note 5, at 385, quoting the Catholic archdiocese’s Peace and Justice Commission of Gulu as saying that “To start war crimes investigations for the sake of justice at a time when the war is not yet over, risks having, in the end, neither justice nor peace delivered.”

47 United Nations Security Council, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616, Aug. 23, 2004, at para. 34 where the UNSG states: “While the international community is obliged to act directly for the protection of human rights and human security where conflict has eroded or frustrated the domestic rule of law, in the long term, no ad hoc, temporary or external measures can ever replace a functioning national justice system.”
judges must be presumed to have a better understanding of the historical and political context of the conflict. The ability of victims and families to bear witness to, and participate in proceedings against those who have so egregiously violated their most basic human rights, could facilitate a better understanding of the justice process by victims and survivors and lead to their acceptance. As we have seen in other conflict situations, victims have reconciled to the idea that given the scale and degree of the atrocities committed against them, some form of justice, albeit an imperfect one, is preferable to no justice at all.\(^{48}\)

From the point of view of deterrence theory, it has been argued that national trials for perpetrators of serious international crimes contribute more effectively to preventing the recurrence of similar crimes in future. For example, in the Rwanda and Yugoslavia contexts, at least one commentator has argued that the establishment and experience of the mixed international Tribunals in Sierra Leone, East Timor and Kosovo show that “justice delivered close to the affected societies in Rwanda or Former Yugoslavia is far more effective than in the remote confines of Arusha or The Hague.”\(^{49}\) Hopefully, successful trials of the LRA in Uganda will not only contribute to deterrence, but also enhance prospects for national reconciliation upon which a sustainable peace can be built. Finally, one cannot over-state the positive effects of such trials on the rule of law, as well as capacity building for Uganda’s legal institutions to deal with serious international crimes.

Having noted the advantages of domestic trials of the LRA, it must also be recognised that in order for Uganda to successfully undertake these prosecutions and stand any chance of meeting the inadmissibility requirements of the Rome Statute, it must first strengthen its national legal

\(^{48}\) In the context of the ICTY for example, Diane Orentlicher has found that while many victims and survivors were not totally satisfied by the cost, speed, indictments issued or sentences imposed by the ICTY, they also accept the idea that the justice administered by the ICTY, imperfect as it may be, is better than no justice at all. See DIANE ORENTLICHER, THAT SOMEONE GUILTY BE PUNISHED: THE IMPACT OF THE ICTY IN BOSNIA 13 (Open Society Justice Initiative 2010): “[T]he victims we interviewed believe that what they experience as imperfect justice is infinitely preferable to none at all.”

\(^{49}\) Jean-Marie Kamatali, From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans, 12 NEW ENG. J. INT’L & COMP. L. 89, at 91 (2005). The author, who was former Dean of Law at the National University of Rwanda, further argues that “For the Rwandan community, on the sides of both the victim and the perpetrator, the justice and deterrence expected from the ICTR results not only from knowing that Akayesu, Kambanda or Bagosora … have been condemned. More importantly, it also results from witnessing the process through which they lost their positions of power, authority and harm.”
framework for the trial of serious international crimes. In its endeavour “to map out the contours of acceptable domestic proceedings,” I suggest that Uganda can learn useful lessons from the experience of the ICTR regarding the prosecutor’s application to transfer cases for trial in Rwandan courts. These lessons are relevant because the ICTR, like other international justice institutions established to deal with grave atrocities, sets not only global, but also national standards of justice. In the words of one commentator, such institutions define “what domestic criminal justice should look like for adjudicating crimes against humanity, genocide, and war crimes.” The next section addresses these lessons.

V. LESSONS FROM THE ICTR EXPERIENCE

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

First, as stated earlier, while the UN-ICTR enjoys primacy over Rwanda regarding the trial of cases falling within the Tribunal’s jurisdiction, the ICC’s jurisdiction only kicks in as a last resort when the inadmissibility conditions under Rome Statute Article 17 are satisfied. In addition to the statutory distinction between primacy and complementarity, a second distinction remains the fact that at the time of ruling on the Prosecutor’s referral requests, the ICTR had most of the indictees in its custody. It was therefore easier for the Judges to impose conditions on their transfer to national jurisdiction. This situation stands in stark contrast to Uganda’s twenty-year inability to arrest the LRA leadership. Indeed the very reason why Uganda is willing to make such jurisdictional concessions to Joseph Kony and his commanders is to encourage them to lay down their arms and surrender — in order words, so as to bring the war to an end. In effect, while Uganda seems to want to sequence peace over justice, the ICC insists on implementing its statutory mandate of bringing to justice those allegedly bearing responsibility for serious international crimes. This provides another important distinction with the Rwanda situation, where the war had ended in 1994, and by the time the Judges ruled on the Prosecutor’s referral

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51 Blumenson, supra note 2, at 805.
requests, both the national and international systems were singularly focussed on bringing the perpetrators to justice.

Despite these differences however, it is suggested that the normative architecture that the ICTR Judges established for the trial of serious international crimes at the domestic level, could provide useful lessons for Uganda’s emerging criminal justice system vis-à-vis the LRA trials. After all, like Rwanda, Uganda counts as another African country grappling with the effects of large-scale internal violence within its borders. While neighbouring Rwanda’s attempt to ensure accountability for genocide and other serious violations of international law took place in a post-conflict setting, Uganda faces an ongoing conflict and therefore the accountability process remains delicate given the equally important goal of securing a lasting peace in the country. Yet, the internal nature of both conflicts, the quest for domestic as opposed to international accountability for grave crimes, debates about the maturity of their respective criminal justice systems to deal with wide-scale atrocities, and perceptions about victors’ justice in both contexts, mean that Uganda can learn useful lessons from the Rwandan experience.

The cornerstone of the normative architecture for referral of cases from the UN-ICTR to national jurisdiction is contained in Rule 11bis of the ICTR rules and the various Decisions of the Trial and Appeals Chamber interpreting it. As there is no question about Uganda’s primary jurisdiction to try the LRA—save for the self-referral—I will focus on the standards which the ICTR Judges have, in their interpretation of Rule 11bis, set for national proceedings to satisfy international legal standards.

A. Trials Must Be for International, Not Ordinary Crimes

In dealing with the Prosecutor’s first-ever Rule 11bis request for referral to national jurisdiction, the ICTR Trial and Appeal Chambers both held that the legal framework of the referral state must not only criminalise the conduct of the accused, but must do so in respect of serious international crimes. According to the Appeals Chamber, the ICTR’s statutory authority regarding referral only permitted it to do so in respect of serious violations

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52 Rule 11bis of the ICTR Rules of Procedure and Evidence provides that a referral can only be made to a state in which the crime was committed; the accused was arrested; or which has jurisdiction and is “willing and adequately prepared” to accept the case. In determining a request for referral, the Trial Chamber is required to consider whether “the accused will receive a fair trial” and that “the death penalty will not be imposed or applied.”

of international humanitarian law, not ordinary crimes. In the circumstances, the Appeals Chamber held, confirming the Decision of the Trial Chamber, that Bagaragaza’s case could not be referred to Norway. The Appeals Chamber reasoned that unlike the ICTR where Bagaragaza would have been tried for genocide and crimes against humanity, the Norwegian penal code only permitted his trial for the ordinary crime of homicide.

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

**B. Uganda Must Conduct Fair Trials**

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

In this context, the jurisprudence of the UN-ICTR holds that the accused must be able to secure the attendance and testimony of witnesses on his behalf under the same conditions as witnesses for the prosecution. In *Munyakazi*, *Kanyarutika* and *Hategekimana* respectively, the ICTR

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54 *Id.*, para. 17.

55 *Id.*, paras. 15, 17. *But see The Prosecutor v. Ildephonse Hategekimana*, “Decision on the Prosecution’s Appeal Against Decision on Referral under Rule 11bis,” Dec. 4, 2008, para. 12 where the Appeals Chamber held that this requirement is limited to the substantive offence charged, and not a mode of liability.

56 See Article 20 and Article 67 of the ICTR Statute and ICC Statutes respectively for a full list of rights of the accused during trial.

57 *The Prosecutor v. Yusuf Munyakazi*, “Decision on the Prosecution’s Appeal Against
Judges held that trials in Rwanda would be unfair where witnesses living in that country were found to be unwilling to testify for the defence due to fear that they may face serious consequences, including threats, harassment, torture, arrest, or being killed.\(^6\)

Similarly, the ICTR case law holds that Rwanda-based trials would be unfair in circumstances where the majority of defence witnesses live outside the country and would be afraid to testify in Rwanda. Although Rwanda and the ICTR Prosecutor both argued that the domestic legal framework provided alternative facilities, such as video-link technology, for the testimony of witnesses who are either unwilling or unable to travel to Rwanda, the Judges were unconvinced that the existence of such facilities provided a sufficient remedy. The Judges recalled their experience at the ICTR where a large majority of defence witnesses travelled to testify in Arusha from places outside Rwanda, and ruled that the utilization of video-link technology could result in a situation where the majority of prosecution witnesses are heard directly by the Chamber, while most defence evidence is only heard indirectly, through video-link testimony. The Judges held that this would violate the principle of equality of arms and render the trial unfair since the right of the accused to obtain the attendance of, and examine witnesses under the same conditions as witnesses for the prosecution, would be violated.\(^6\)

Furthermore, national level trials must be held in an environment conducive to defence work, including investigations, access to documents and witnesses. In Kanyarukiga, the ICTR Appeals Chamber held that difficulties experienced by defence counsel in obtaining documents and meeting potential witnesses, especially detainees in Rwanda, shows that “working conditions for the defence may be difficult” and this could affect the fair trial rights of the Accused.\(^6\)

Uganda must also establish an independent and impartial witness

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\(^{59}\) Hategekimana, supra note 55.

\(^{60}\) Munyakazi, supra note 57, para. 37; Kanyarukiga, supra note 58, paras. 25, 26; Hategekimana, supra note 55, para. 22.

\(^{61}\) Munyakazi, supra note 57, paras. 40-42; Kanyarukiga, supra note 58, para. 33; Hategekimana, supra note 60, para. 24.

\(^{62}\) Kanyarukiga, supra note 58, para. 21.
protection program, which is accessible by both Parties. In this respect, the ICTR case law holds that where a witness protection service was located in the office of Rwanda’s Prosecutor General and complaints of witness harassment have to be reported to the police, potential defence witnesses may be afraid to avail themselves of its services and thus undermine the prospects of a fair trial.\textsuperscript{63}

\textbf{C. There Must Be an Adequate Penalty Structure}

The ICTR case law also lays down that ambiguity regarding the penalty structure or sanctions regime governing serious international crimes, may render a domestic legal framework inadequate to try such offences. In Bagaraza, one of the reasons implicit in the Trial Chamber’s denial of the Prosecutor’s referral request to Norway was that Bagaraza would only face a maximum term of 21 years imprisonment if tried as an accessory to homicide or for negligent homicide under Norwegian law, rather than life imprisonment following a genocide trial at the Tribunal.\textsuperscript{64} Similarly, in Munyakazi and Kanyarukiga, the Trial and Appeals Chambers both held that ambiguity regarding which one of two penalty regimes in Rwanda would govern cases transferred under Rule 11\textit{bis}, raised the possibility that life imprisonment in isolation could be imposed. Since such a penalty would violate the right of the accused not to be subjected to cruel, inhuman or degrading treatment or punishment, and there was no evidence that the minimum safeguards against such an exceptional penalty were available under Rwandan law, the Judges held that referral could not be ordered to that country.\textsuperscript{65} Indeed, this issue was of such fundamental concern to the

\textsuperscript{63} Id., para. 27.

\textsuperscript{64} The Prosecutor v. Michel Bagaraza, “Decision on the Prosecution Motion for Referral to the Kingdom of Norway,” May 19, 2006, para. 9.

\textsuperscript{65} Munyakazi, supra note 57, paras. 19, 20; Kanyarukiga, supra note 58, paras. 12, 13, 15. The ambiguity arose out of whether the punishment regime to be applied to referral cases was the one under Rwanda’s Organic Law No. 11/2007, Mar. 16, 2007, (Concerning the Transfer of Cases to Rwanda from the ICTR) which provides for a maximum sentence of life imprisonment, or the regime under the Abolition of the Death Penalty Law, No. 31/2007, dated July 25, 2007, which provided for the possibility of life imprisonment with special provisions (i.e., solitary confinement) for certain categories of offenders including those convicted of genocide. The Appeal Chamber held that there were at least three alternative interpretations of the sanctions regime under Rwandan law including that (i) since the Death Penalty Abolition law post-dated the Transfer Law, it was \textit{lex posterior} and should therefore be applicable (ii) the Transfer Law was \textit{lex specialis} and its provisions cannot be displaced by a general law; (iii) there was in fact no inconsistency between the laws and the Death Penalty Law merely elaborated the sentencing structure under the Transfer Law. The Appeals Chamber held that it fell within the jurisdiction of the Rwandan courts to determine which of these regimes applied, but that the legal ambiguity was
Judges that although Rwanda had passed legislation excluding life imprisonment in solitary confinement from cases referred from the ICTR, the ICTR still denied the Prosecutor’s subsequent request to refer Hategekimana’s case on the ground that the Amendment Law had not yet entered into force at the time of the Appeal Chamber’s Decision.\(^6\)

The relevance of this holding to the situation in Uganda is self-evident. If Uganda applies the provisions of the 2007 Agreement calling for a “regime of alternative penalties and sanctions,” and proceeds, after trial, to place the LRA leaders under sanctions such as house arrest, apologies, or compensation under a traditional justice process, it is unlikely that the domestic trials will meet international standards or indeed the inadmissibility tests under the Rome Statute.\(^6\)

**VII. PROCEDURAL OPTIONS OPEN TO UGANDA**

The Rome Statute contains several provisions that could be invoked in support of domestic trials of the LRA. First of all, Uganda can on the basis of Article 16 of the Rome Statute, request the United Nations Security Council to adopt a Chapter VII resolution deferring the ICC investigation or prosecution for a renewable period of one year.\(^6\) As discussed below, the Security Council’s “power of negative intervention”\(^6\) in the work of the ICC, while possible on paper, is a difficult one in practice. First, in order to convince the Security Council to act, Uganda must demonstrate that deferment of the ICC’s work would be in the interests of international peace and security under Chapter 39 of the United Nations Charter, not just domestic peace in the country. In other words, at a *prima facie* level, the Council would have to determine that proceeding with the international prosecution would constitute a threat to international peace and security before it can order deferral.

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\(^6\) *Hategekimana*, supra note 55, paras. 37, 38.


\(^6\) Article 16 provides:

> 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.

Secondly, even if it were possible for one to convincingly argue that the deferral request would meet the legal threshold to trigger Security Council action, Uganda has to be able to successfully canvass and convince a majority of the members of the Security Council and not receive a negative vote from any of the permanent five. Given the difficult political dynamics and the existing divisions in the Council regarding the role of the ICC, it is unlikely that Uganda would be able to muster sufficient political will on the part of Council members for them to flex their Article 16 muscle.

Moreover, if the track record of the Security Council on Article 16 matters is anything to go by, then it is highly unlikely that Uganda will succeed even where it chooses to explore this option. In 2009, the African Union itself, the continental body that represents all of Africa’s 53 member states of the United Nations, invited the Security Council to invoke Article 16 powers so as to defer the ICC investigation against President Omar Hassan Al Bashir of Sudan, the sitting Sudanese Head of State. In making that request, the African Union reasoned that the ICC investigation and possible issuance of an arrest warrant against President Bashir could derail the Union’s peace initiatives in Darfur. Indeed it was the African Union’s position that while it supported accountability for serious crimes committed in Darfur, this process should be properly sequenced so that the continent’s efforts to secure a political settlement are not undermined.

Unfortunately, the Security Council failed to take a decision on the African Union proposal, leading to strained relations not only between the Union and Council, but also between the Union and the Court. Relations reached their lowest point when the African Union Assembly of Heads of State adopted a Declaration in Sirte, Libya in 2009 calling on its members not to cooperate with the ICC investigation on the Bashir dossier and threatening to withdraw from the Court altogether. Given this experience, it is unlikely that Uganda can succeed on an Article 16 request where the


71 Charles Chernor Jalloh, *Universal Jurisdiction, Universal Prescription: A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction*, CRIM. L.F. 21:1, at 28 (2010). For a detailed discussion of the African Union request to the UNSC, see the African Experts paper supra, note 69 above. Indeed, faced with the UNSC’s failure to act on its request, the African Union has proposed an amendment to Article 16 which would allow the UN General Assembly to consider an article 16 deferral request where the UNSC fails to do so within six months. As the African experts correctly note, this proposal is also laden with legal difficulties.
whole of the African Union has failed. In effect, while deferment of the LRA case by the Security Council remains a theoretical possibility, in practice it is fraught with difficulty including the fact that even if successful, such a deferral would only last for one year at a time and the drafting history of the Rome Statute does not permit the use of Article 16 as a political weapon to block prosecutions on a permanent basis.

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

The second variant of the admissibility challenge contained in Article 17 takes place *ex post facto*, i.e., after the completion of domestic proceedings. This variant, which invokes the *non bis in idem* principle, is to the effect that national proceedings have already taken place and therefore it would be unfair to try the accused a second time for the same conduct. As I have argued above, in order for Uganda to successfully invoke this variant of admissibility challenge, it must show that national trials of the LRA were

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72 Decision on the Admissibility, Mar. 10, 2009. Uganda’s Solicitor-General submitted before the PTC that “the Government of Uganda ha[d] not conducted and di[d] not intend to conduct national proceedings in relation to the persons most responsible for these crimes, so that the cases may be dealt with by the ICC instead.”

73 See the statements of President Museveni quoted in Ssenyonjo, *supra* note 8. See *contra*, the above submissions of Uganda’s Solicitor-General before the ICC Pre-Trial Chamber in the “Decision on Admissibility”.

74 See Articles 17(1)(c) and 20(3) of the Rome Statute. Relevant to this option is the ICC Pre-Trial Chamber’s holding in the “Decision on Admissibility” that domestic proceedings must relate both to the person and the conduct which is subject of the case before the Court.
credible, fair, not intended to shield particular individuals from responsibility, and conducted in accordance with international standards.

In addition to the procedural options open to Uganda, the ICC Prosecutor also has power under the Rome Statute to discontinue or reconsider ongoing investigations or prosecutions. The Statute confers discretion on the Prosecutor to determine, upon reviewing information made available to him, that he lacks a reasonable basis to proceed with an investigation or prosecution. Such a conclusion could be based on the Prosecutor’s determination, following a review of the gravity of the crime and the interests of the victims, that prosecution would not be in the interests of justice. Therefore, the Rome Statute itself makes provision, as I have argued above, for a consequentialist analysis of international prosecution. The interests of justice criterion under the Rome Statute allows the ICC Prosecutor to stop an investigation or prosecution where other compelling reasons lead to the conclusion that prosecution will not serve the interests of justice. Arguably, the need to secure a peaceful settlement and an end to human suffering that comes with violent conflict or war, provides sufficient reason to invoke the Prosecutor’s Article 53 powers.

However, the ICC Prosecutor has argued in his policy paper on the Interests of Justice that there is a difference between the “interests of justice” and “the interests of peace” and that the latter falls outside the mandate of the Prosecutor’s Office. The paper also makes clear that the Prosecutor’s exercise of the discretion conferred by Article 53 is of a limited and exceptional nature, which will be guided by the presumption in favour of prosecution as well as the purpose and objects of the Statute in fighting impunity for serious international crimes.

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

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76 Id.
CONCLUSION

The Uganda situation is complex and multi-faceted. A long, drawn-out, violent internal conflict has eluded peaceful resolution despite various domestic and international initiatives. There is no question that those responsible for committing serious international crimes in the course of this conflict must be brought to justice and held accountable. Ironically, the international accountability process set in motion in 2003 through Uganda’s self-referral has become complicated by a welcome, albeit unforeseen, disposition of the LRA to negotiate peace. This apparent willingness by the LRA to negotiate peace has led to agreement that they will face domestic accountability instead of trial at the ICC. However, the LRA’s failure to sign up to the final peace deal raised questions about their commitment to peace and left the provisions on domestic accountability hanging in the balance. In addition, the failure of Uganda and its neighbours, such as Sudan and the Democratic Republic of Congo, to arrest Kony or otherwise convince him to surrender, has left the ICC warrants in the air with no indication if and when they can be meaningfully enforced.

This paper argues that it would be unwise to insist upon Hague-based trials of the LRA at all costs. Given the domestic peace imperative, the large domestic constituency that continues to advocate for accountability options other than the ICC, and the fact that most evidence and victims are located in Uganda, Uganda-based trials offer the best prospect of securing both peace and justice in the LRA case. Yet, it must be emphasized that for as long as the LRA continues to hold out in the jungles of the DRC, the ICC warrants must be kept in place as an incentive both to the LRA to fully commit to a peace process and benefit from domestic accountability, and for the Government of Uganda to ensure that any future domestic trial is credible and meets international legal standards. Presumably, credible and genuine domestic trials of the LRA leaders would contribute to the realisation of the international community’s objective of fighting impunity and promoting accountability for serious violations of international law, while at the same time, providing a basis for sustainable peace and reconciliation in Uganda.

As matters stand, there are no winners in the Ugandan situation. The justice processes in both Uganda and the ICC are hamstrung by their failure to arrest Kony and his commanders. The continuing ability of the rebel leadership to evade justice does not serve the government and people of Uganda’s call for a peaceful end to the war; victims continue to suffer from an environment of terror and deprivation; the ICC’s credibility hangs in the balance because of the perception that the arrest warrants constitute an impediment to a final peace settlement; and the international community’s
objective of fighting impunity and ensuring accountability for the grave crimes committed in Uganda, seem to be held in perpetual abeyance.

Given these circumstances, perhaps the ICC would do well to content itself by the fact that the existence of the arrest warrants has produced a shift in the bargaining positions of the rebel leadership and presumably, a better disposition on their part to end the war and face accountability in domestic courts. This can only be a sign of the relative effectiveness of the ICC regime. After all, positive complementarity must account for the effect of the Rome System of justice in spurring genuine and effective domestic prosecutions for grave violations of international law. This, it is submitted, was the dream and desire of the founders of the Rome Statute. That dream and desire—indeed the intent of the drafters of the Rome Statute—will be fulfilled by paying heed to the delicate political and legal landscape in Uganda and by supporting the domestic accountability process—at least for the time being.