

THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY

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[In 2004, the conflict in northern Uganda became the first situation to be referred to the International Criminal Court ('ICC'). Although an investigation was initiated by the Office of the Prosecutor ('OTP') and arrest warrants were issued in 2005 for five leaders of the rebel Lord's Resistance Army ('LRA'), no defendants have as yet been brought before the Court. The referral has been dogged with controversy from the beginning. In 2006, negotiations began between the Government of Uganda and the LRA aimed at ending the conflict, with suggestions that any peace agreement include an amnesty for crimes committed during the conflict. This commentary considers the various legal and policy issues involved in the referral and the consequent investigation. It examines the legality of Uganda's 'self-referral' and the propriety of the Prosecutor of the ICC's criteria for case selection. The arrest warrants and subsequent proceedings at the Court are considered, and the implications for the Court's continuing involvement of any amnesty are analysed. The commentary concludes by assessing the implications of the situation for the ICC's credibility and continuing effectiveness.]

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I INTRODUCTION

In December 2003, the Ugandan Government referred the 'situation concerning the Lord's Resistance Army' to the Prosecutor of the International Criminal Court ('ICC').¹ On 29 January 2004, the Court announced its first referral.² Six months later, the Prosecutor announced that, having determined that the requirements in the *Rome Statute of the International Criminal Court* ('*Rome Statute*')³ had been met, he had decided to open an investigation into the

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¹ The press release simply stated that the referral had taken place in December 2003. In fact, the letter of referral was dated 16 December 2003: *Warrant of Arrest for Joseph Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-53 (issued 8 July 2005) 9–10.

² ICC, 'President of Uganda Refers Situation concerning the Lord's Resistance Army (LRA) to the ICC' (Press Release, 29 January 2004), available from <<http://www.icc-cpi.int>> at 18 May 2007.

³ Opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

situation concerning northern Uganda.⁴ On 14 October 2005, it was announced that arrest warrants had been issued for five leaders of the Lord's Resistance Army ('LRA'): Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen.⁵ The warrants had been issued by Pre-Trial Chamber II on 8 July 2005 but had been kept under seal.⁶ They alleged that the LRA leaders had committed multiple counts of crimes against humanity and war crimes.⁷

Since then, however, there has been little apparent progress. The warrant and requests for arrest and surrender have been transmitted to Uganda and its neighbours Sudan and the Democratic Republic of Congo ('DRC').⁸ Interpol has issued 'Red Notices',⁹ requesting its 184 Member States to arrest and detain the five LRA leaders with a view to their surrender to the ICC.¹⁰ Furthermore, one of the named LRA leaders, Raska Lukwiya, has been confirmed dead.¹¹ He was reportedly killed during a firefight between the Ugandan People's Defence Force ('UPDF') and the LRA on 12 August 2006.¹² More significantly, however, none of the persons for whom arrest warrants have been issued have been apprehended. Negotiations aimed at ending the conflict in northern Uganda opened between the Ugandan Government and the LRA in 2006. According to

⁴ ICC-OTP, 'Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda' (Press Release, 29 July 2004), available from <<http://www.icc-cpi.int>> at 18 May 2007.

⁵ See Luis Moreno-Ocampo, Chief Prosecutor of the ICC, 'Statement by Chief Prosecutor Luis Moreno-Ocampo' (Press Briefing, 14 October 2005), available from <<http://www.icc-cpi.int>> at 18 May 2007 ('Statement from 14 October 2005'). See generally ICC-OTP, 'The Investigation in Northern Uganda: Background to the Conflict in Northern Uganda' (Press Briefing, 14 October 2005), available from <<http://www.icc-cpi.int>> at 18 May 2007.

⁶ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-52 (13 October 2005) 10 (Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest).

⁷ *Warrant of Arrest for Joseph Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-53 (issued 8 July 2005) 12–19; *Warrant of Arrest for Vincent Otti (Pre-Trial Chamber II)* ICC-02/04-01/05-54 (issued 8 July 2005) 12–20; *Warrant of Arrest for Raska Lukwiya (Pre-Trial Chamber II)* ICC-02/04-01/05-55 (issued 8 July 2005) 8–10; *Warrant of Arrest for Okot Odhiambo (Pre-Trial Chamber II)* ICC-02/04-01/05-56 (issued 8 July 2005) 10–12; *Warrant of Arrest for Dominic Ongwen (Pre-Trial Chamber II)* ICC-02/04-01/05-57 (issued 8 July 2005) 8–10.

⁸ See 'Uganda: ICC Issues Arrest Warrants for LRA Leaders', *IRIN News* (Nairobi, Kenya) 7 October 2005 <<http://www.irinnews.org/report.aspx?reportid=56630>> at 18 May 2007.

⁹ ICC-OTP, 'Interpol Issues First ICC Red Notices' (Press Release, 1 June 2006), available from <<http://www.icc-cpi.int>> at 18 May 2007.

¹⁰ Interpol and the OTP have entered into a 'Co-operation Agreement': see ICC-OTP, 'Cooperation Agreement between the Office of the Prosecutor and Interpol' (Press Release, 22 December 2004), available from <<http://www.icc-cpi.int>> at 18 May 2007. The text of this agreement can be found at: Interpol, *Co-operation Agreement between the Office of the Prosecutor of the International Criminal Court and the International Criminal Police Organization-Interpol* (2005) <<http://www.interpol.int/Public/ICPO/LegalMaterials/cooperation/agreements/ICC2005.asp>> at 18 May 2007.

¹¹ Luis Moreno-Ocampo, Chief Prosecutor of the ICC, 'Statement by the Chief Prosecutor Luis Moreno-Ocampo on the Confirmation of the Death of Raska Lukwiya' (Press Briefing, 7 November 2006) <http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20061107_en.pdf> at 18 May 2007 ('Statement from 7 November 2006').

¹² ICC-OTP, 'Statement by the Chief Prosecutor Luis Moreno-Ocampo on the Reported Death of Raska Lukwiya' (Press Release, 14 August 2006), available from <<http://www.icc-cpi.int>> at 18 May 2007. However, news that another commander, Dominic Ongwen, had been similarly killed proved to be false: see ICC-OTP, 'ICC Unseals Results of Dominic Ongwen DNA Tests' (Press Release, 7 July 2006), available from <<http://www.icc-cpi.int>> at 18 May 2007.

credible reports, these negotiations included discussion of a possible amnesty for the LRA leadership.¹³ Although in its communications with the Court the Ugandan Government has stated that it will continue to comply with its obligations under the *Rome Statute*, other statements suggest otherwise.¹⁴ As the *Rome Statute* does not expressly provide for national amnesties, the Court may be put in an embarrassing position that could severely damage its credibility.

Indeed, the referral has been controversial from the beginning. The legality of self-referrals in general has been questioned;¹⁵ whilst the form of the referral itself led to suspicions that the Ugandan Government was using the Court as a weapon in its conflict with the LRA.¹⁶ In particular, there was a concern that the Office of the Prosecutor ('OTP') might only investigate the activities of the LRA and ignore those of the UPDF,¹⁷ which has also been accused of committing human rights violations in northern Uganda.¹⁸ Other commentators have suggested that an ICC investigation would exacerbate the conflict, not least because ICC prosecutions would trump amnesties granted under the *Amnesty Act 2000* (Uganda) ('*Amnesty Act*'), adopted to encourage the surrender of LRA fighters.¹⁹ Some groups in northern Uganda and their non-governmental organisation ('NGO') supporters have also argued that indigenous justice mechanisms are best suited to ending the conflict and encouraging reconciliation between the LRA and its victims.²⁰ Others have worried about whether the investigation itself might put victims and witnesses of LRA activities in danger.²¹

¹³ See, eg, 'Taping the LRA', *Africa Confidential* 47(11) (London, UK) 26 May 2006, 4.

¹⁴ See Jeevan Vasagar, 'Lord's Resistance Army Leader is Offered Amnesty by Uganda', *The Guardian* (London, UK) 5 July 2006, 14:

'President Yoweri Museveni has declared that the Uganda [sic] government will grant total amnesty to the leader of the Lord's Resistance Army, Joseph Kony, despite the international criminal court indictment,' the presidential press secretary, Onapito Ekomoloit, said in a statement.

Cf ICC-OTP, 'Statement by the Chief Prosecutor Luis Moreno-Ocampo' (Press Release, 12 July 2006), available from <<http://www.icc-cpi.int>> at 18 May 2007:

The Ugandan Minister for Security, Mr Amama Mbabazi, was here [at the ICC] as part of a regular exchange between the Office of the Prosecutor and the Government of Uganda. The Office of the Prosecutor was updated on the peace talks currently underway in Southern Sudan. The Government of Uganda did not ask for any withdrawal of the warrants of arrest.

See also Mirjam Blaak, Head of Ugandan Delegation, 'Statement by Uganda' (Statement, Fifth Assembly of States Parties to the International Criminal Court, The Hague, 23 November 2006) 3–4 <http://www.icc-cpi.int/library/asp/ICC-ASP5_Statement_uganda.pdf> at 18 May 2007.

¹⁵ See Arsanjani H Mahnouch and W Michael Reisman, 'The Law-In-Action of the International Criminal Court' (2005) 99 *American Journal of International Law* 385, 388–91.

¹⁶ See Paola Gaeta, 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?' (2004) 2 *Journal of International Criminal Justice* 949, 952.

¹⁷ Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (2006) 97.

¹⁸ *Ibid* 175.

¹⁹ *Ibid* 74.

²⁰ Alex Odongo, 'Acholi Chief Opposes Kony Trial', *New Vision* (Kampala, Uganda) 8 November 2004 <http://www.newvision.co.ug/D/8/13/398443/Acholi_Chief_Opposes_Kony_Trial> at 18 May 2007.

²¹ Allen, above n 17, 102–10.

This commentary will examine both the legal implications of developments at the Court and the validity of the criticisms made of its activities. A brief introduction will set the referral in its historical context. A number of issues will then be considered, including the law and politics of Uganda's 'self-referral', and the criticisms made concerning the Court's involvement in the situation. Particular attention will be paid to the OTP's alleged selectivity in its pursuit of the LRA leadership. The arrest warrants issued by the Court for five LRA leaders in July 2005 will be examined and subsequent developments, both at the Court and on the ground, will be described. As suggestions have been made that any peace agreement might include an amnesty for crimes committed during the conflict, the effects of such a provision on the Court's jurisdiction and the Prosecutor's ability to discontinue proceedings will be considered. Finally, the commentary will consider how the Court might be extricated (or not) from its current dilemma and the implications of this situation for the Court's continuing effectiveness.

II THE SITUATION IN NORTHERN UGANDA²²

Divisions between north and south, exacerbated, if not created, by the colonial authorities, have been the dominant theme in Uganda's post-independence politics.²³ The LRA has its origins in northern Ugandan political unrest following the January 1986 overthrow of General Tito Okello's regime by the National Resistance Army ('NRA'), led by Yoweri Museveni.²⁴ Okello had come to power as the result of a coup by Acholi soldiers in the Uganda National Liberation Army ('UNLA'), the then-national army.²⁵ Following their defeat by the NRA, members of the UNLA retreated north to Acholiland and Southern Sudan, setting up a number of armed opposition groups, the most significant of which was the Uganda People's Democratic Army ('UPDA').²⁶ The unrest in Acholiland also led to the emergence of local spirit mediums — individuals claiming to be able to communicate with spirits for healing and divination purposes — as political leaders and military commanders.²⁷ In August 1986, one such spirit medium, Alice Auma Lakwena, established the Holy Spirit Movement. She led her followers south towards Kampala but was defeated and her forces dispersed.²⁸ Most of the UPDA surrendered to the Ugandan Government in 1988.²⁹

²² This section relies heavily on Tim Allen's *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (2006): see especially 25–71.

²³ *Ibid* 28.

²⁴ *Ibid* 29.

²⁵ *Ibid* 30. The UNLA was largely composed of northerners, in contrast to the NRA, which drew its recruits from the south of the country. See Allen, above n 17, 29–30.

²⁶ *Ibid* 30.

²⁷ *Ibid* 30, 32.

²⁸ *Ibid* 35–6.

²⁹ *Ibid* 36.

The remnants of these various movements, however, coalesced to form two new groups, both inspired by the example of Alice Lakwena. One of these groups was led by Alice's father, Sevarino Lukoya, the other by Joseph Kony.³⁰ Lukoya's movement, the Lord's Army, was defeated in 1989.³¹ However, Kony's group, the LRA, has persisted until today. Joseph Kony claims to be both a relative of Alice Lakwena and a spirit medium.³²

The LRA has maintained a guerrilla campaign against the Ugandan Government and those it considers to be its collaborators.³³ The conflict has been concentrated in Acholiland — in the Gulu, Kitgum and Pader districts³⁴ — but has also spilled into the neighbouring districts of Lira, Apac, Adjumani, Kumi and Soroti.³⁵ Since 1994, the LRA has received support from the Sudanese Government, which has permitted the LRA to base itself in Sudanese territory.³⁶ A key tactic of the LRA has been the abduction and forcible recruitment of young people, including children, into its ranks to serve as soldiers, porters and 'wives' (sex slaves).³⁷ In general, the LRA has avoided battle with the UPDF, seeking instead to terrorise the local population, in particular, engaging in the killing and mutilation of civilians, and the looting and destruction of civilian homes and property.³⁸

As a major result of the conflict, a large proportion of the northern Ugandan population has been moved out of the countryside into towns and internally displaced person ('IDP') camps.³⁹ It has been estimated that by mid-2005, over 1.5 million people were living in IDP camps in the region.⁴⁰ These people largely depend on United Nations World Food Programme handouts and suffer from high mortality rates, particularly among children, as proper sanitation and healthcare in the camps are lacking.⁴¹ Fatal outbreaks of meningitis, cholera and measles were reported in the camps in 2006.⁴² The atrocities committed by the LRA may be better publicised and more immediately appalling but, as Tim Allen

³⁰ Ibid.

³¹ Ibid 37.

³² Ibid 37–8.

³³ Ibid 39.

³⁴ Ibid.

³⁵ Ibid 73.

³⁶ Ibid 42–3.

³⁷ See Human Rights Watch, *Stolen Children: Abduction and Recruitment in Northern Uganda* (2003) 10 <<http://hrw.org/reports/2003/uganda0303>> at 18 May 2007.

³⁸ Allen, above n 17, 47, 49. Mutilations include the cutting off of hands, lips, noses and ears: at 47.

³⁹ Ibid 53.

⁴⁰ This number excludes unregistered IDPs: UN Office for the Coordination of Humanitarian Affairs, *Uganda 2005 Mid-Year Review* (2005) 1 <<http://ochaonline.un.org/cap2005/webpage.asp?Page=1213>> at 18 May 2007. The estimate may now be higher: 'Pressure Mounts to End Neglect of the North', *Africa Confidential* 47(15) (London, UK) 21 July 2006, 2 (giving a figure of 1 700 000 IDPs).

⁴¹ According to a 2005 survey of IDP camps carried out under the auspices of the World Health Organization, the overall crude mortality rate amongst IDPs in Gulu, Kitgum and Pader districts was 1.5 per 10 000 per day. A mortality rate of 3.18 per 10 000 per day was calculated for children under five years of age. A rate above one is generally categorised as an emergency: Republic of Uganda, Ministry of Health, *Health and Mortality Rates among Internally Displaced Persons in Gulu, Kitgum and Pader Districts, Northern Uganda* (2005) ii, iii <<http://www.who.int/hac/crises/uga/sitreps/Ugandamortsurvey.pdf>> at 18 May 2007.

⁴² 'Pressure Mounts to End Neglect of the North', above n 40, 2.

states, '[p]eople in the IDP camps live in a place of extraordinary structural violence'.⁴³

The movement of the northern Ugandan population into IDP camps has been an element of the Ugandan Government's counterinsurgency policy.⁴⁴ Instances of forced displacement and other human rights violations have been credibly alleged against the UPDF. Indeed, a highly critical report issued by Human Rights Watch in September 2005 accused the UPDF of arbitrary arrests and detentions, the wilful killing of civilians, rape and torture.⁴⁵ Furthermore, it claimed that civil and military authorities had made few efforts either to investigate such allegations or prosecute those responsible.⁴⁶ Although the LRA has little popular support, many in northern Uganda view the UPDF as an occupying force and see themselves as caught 'between two fires'.⁴⁷

While the Ugandan Government has largely pursued a military solution to the conflict, it has also passed the *Amnesty Act* in an effort to encourage the surrender of LRA fighters.⁴⁸ This offers pardon to all Ugandans engaged or engaging in acts of rebellion against the Government of Uganda since 26 January 1986 and establishes an Amnesty Commission to oversee the granting of amnesty.⁴⁹ President Museveni initially opposed the Act and only reluctantly assented to it, but it does have strong supporters, particularly in northern Uganda and among NGOs.⁵⁰ By mid-2004, over 5000 adult LRA fighters had surrendered and applied for amnesty, although the number coming forward has since diminished to a trickle.⁵¹

Many of those who lobbied for and supported the *Amnesty Act* have also argued for reconciliation at the local level through 'traditional' justice mechanisms. Prominent supporters have been the Acholi Religious Leaders' Peace Initiative, dominated by local Catholic and Anglican clergy, and the Council of Elders Peace Committee and the Council of Chiefs, which are associations of Acholi traditional leaders.⁵² The first group has emphasised forgiveness in accordance with Christian teachings,⁵³ whilst the latter has argued for indigenous justice and healing mechanisms as performed by traditional leaders.⁵⁴ Local and international NGOs have supported such initiatives as promoting 'restorative' rather than 'retributive' justice, and for being more in

⁴³ Allen, above n 17, 60.

⁴⁴ Human Rights Watch, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda* (2005) 62 <<http://hrw.org/reports/2005/uganda0905/uganda0905.pdf>> at 18 May 2007.

⁴⁵ *Ibid* 24–35.

⁴⁶ *Ibid* 36–7.

⁴⁷ Human Rights Focus and WITNESS (producers), *Between Two Fires: Torture and Displacement in Northern Uganda* (2006), available from <<http://witness.org>> at 18 May 2007.

⁴⁸ Allen, above n 17, 74.

⁴⁹ *Amnesty Act 2000* (Uganda) ss 3–4. For discussion of the Act, see Lucy Hovil and Zachary Lomo, 'Whose Justice? Perceptions of Uganda's *Amnesty Act 2000*: The Potential for Conflict Resolution and Long-Term Reconciliation' (Working Paper No 15, Refugee Law Project, 2005).

⁵⁰ Allen, above n 17, 74–6.

⁵¹ *Ibid* 75–6.

⁵² *Ibid* 132.

⁵³ *Ibid* 160.

⁵⁴ *Ibid* 136–7.

accordance with Acholi culture.⁵⁵ Such rituals are often referred to as *mato oput*, which, although not wholly accurate, 'has become a sort of euphemism for healing rites or blessings performed by the *rwodi moo* (anointed chiefs), which promote reintegration of former LRA combatants into society by offering "forgiveness".⁵⁶ Whether such beliefs are entirely reflective of popular opinion in Acholiland, and, indeed, the extent to which such rituals embody, rather than co-opt, Acholi traditions has been questioned.⁵⁷ Their proponents, however, have been vocal critics of the ICC's involvement in the conflict in northern Uganda.⁵⁸

Before examining these criticisms, the legality of referring the situation in northern Uganda to the Court will be considered.

III UGANDA'S SELF-REFERRAL

The ICC's jurisdiction may be triggered in three ways: when a situation is referred to the Prosecutor by a State Party to the *Rome Statute* under art 14; when it is referred by the Security Council acting under Chapter VII of the *Charter of the United Nations*; or when the Prosecutor initiates an investigation *proprio motu*.⁵⁹ It was originally thought that state referrals would be rare, not least because provisions for interstate complaints in human rights treaties have remained largely unused.⁶⁰ What has developed, however, is a practice of 'self-referral', whereby state parties refer situations occurring in their own territory to the Court.

This development was prefigured in an early policy paper by the OTP.⁶¹ Discussing the complementary nature of the Court and the exceptions to the primacy of state jurisdiction set out in art 17 of the *Rome Statute*, the paper commented:

There is no impediment to the admissibility of a case before the Court where no State has initiated any investigation. There may be cases where inaction by States is the appropriate course of action. For example, the Court and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach. Groups bitterly divided by conflict may oppose prosecutions at each others' hands and yet agree to a prosecution by a Court perceived as neutral and impartial. ... In such cases there will be no question of 'unwillingness' or 'inability' under art 17.⁶²

⁵⁵ Ibid 129.

⁵⁶ Ibid 134.

⁵⁷ Ibid 137–60.

⁵⁸ Examples include statements made by Bishop McLeod Ochola and Father Carlos Rodriguez (both from the Acholi Religious Leaders' Peace Initiative), Zachary Lomo of the Refugee Law Project, and Moses Saku, spokesman for the Government's Amnesty Commission: Adam Branch, 'International Justice, Local Injustice' (2004) 51(3) *Dissent* 24. See also Hovil and Lomo, above n 49.

⁵⁹ *Rome Statute*, above n 3, art 13.

⁶⁰ See Daniel D Ntanda Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues' (1999) 10 *Criminal Law Forum* 87, 109.

⁶¹ ICC-OTP, *Paper on Some Policy Issues before the Office of the Prosecutor* (Policy Paper, September 2003) 6 <http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf> at 18 May 2007 ('*Paper on Some Policy Issues*').

⁶² Ibid 5.

In an annex to the paper on the management of referrals and communications by the OTP, it was further stated:

Where the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage of knowing that the State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute. Because the State, of its own volition, has requested the exercise of the Court's jurisdiction, the Prosecutor can be confident that the national authorities will assist the investigation, will accord the privileges and immunities necessary for the investigation, and will be anxious to provide if possible and appropriate the necessary level of protection to investigators and witnesses.⁶³

It appears that the Prosecutor has pursued a policy of encouraging states to self-refer situations.⁶⁴ Soliciting self-referrals not only has the practical advantages listed in the OTP policy paper but also means that the Prosecutor can avoid having to act *proprio motu*, which would be far more politically controversial.⁶⁵ The practice does, however, raise both legal and policy issues. Nothing in the text of art 14 of the *Rome Statute* prohibits states from making self-referrals. The question, therefore, is not whether the Court has jurisdiction but whether self-referred situations are admissible.

Examining the situation in northern Uganda, the Court appears to have jurisdiction over the crimes alleged against the LRA leadership. They are crimes within the jurisdiction of the Court,⁶⁶ allegedly committed within the territory of a State Party to the *Rome Statute*⁶⁷ following the Statute's entry into force.⁶⁸ The real issue is with regard to admissibility — no investigation has been initiated by the Ugandan authorities in respect of the LRA leaders' alleged criminal activities. This has not been because of an inability or unwillingness of the court system to manage such a process. The Ugandan courts, and the civil courts at the very least, are generally considered to be independent of the executive.⁶⁹ Rather, there have been no domestic criminal proceedings because the Ugandan Government has been unable to capture the LRA leadership and bring them before a court.

⁶³ ICC-OTP, *Annex to the 'Paper on Some Policy Issues Before the Office of the Prosecutor': Referrals and Communications* (Policy Paper, September 2003) 5 <http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf> at 18 May 2007.

⁶⁴ See Luis Moreno-Ocampo, Chief Prosecutor of the ICC, 'Report of the Prosecutor of the ICC' (Report, Second Assembly of States Parties to the *Rome Statute of the International Criminal Court*, 2003) 4 <[http://www.un.org/law/icc/asp/2ndsession/ocampo_statement_8sep\(e\).pdf](http://www.un.org/law/icc/asp/2ndsession/ocampo_statement_8sep(e).pdf)> at 18 May 2007.

⁶⁵ See Gaeta, above n 16, 950, where the author comments that

the Court has made its first steps in the guise of an institution that can assist states to obtain justice in the face of mass atrocities committed within their boundaries, rather than as an interfering international watchdog against which states have to defend themselves.

⁶⁶ *Rome Statute*, above n 3, art 5.

⁶⁷ *Ibid* art 12(2).

⁶⁸ *Ibid* art 11. Uganda became a party to the *Rome Statute* on 14 June 2002. On 27 February 2004, it also made a declaration of temporal jurisdiction accepting the Court's jurisdiction from 1 July 2002 (the date the *Rome Statute* came into force).

⁶⁹ See US Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices, 2005: Uganda* (2006) <<http://www.state.gov/g/drl/rls/hrrpt/2005/61598.htm>> at 18 May 2007.

In determining admissibility, art 17 of the *Rome Statute* provides, inter alia, that:

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 ...

Those who support self-referrals have argued that art 17(1)(a) and (b) only apply if an investigation or prosecution has been commenced — if none has been initiated, there is no obstacle to a case being dealt with by the Court.⁷⁰ The preamble of the *Rome Statute* refers to ‘the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’.⁷¹ However, this is in the context of ending the impunity of perpetrators committing the ‘most serious crimes of concern to the international community’,⁷² and if this can best be done by the State having territorial jurisdiction referring a situation to the ICC, there is nothing objectionable in that. Provided that a self-referral is accompanied by a ‘waiver of complementarity’ — that is, by abstention at the national level from launching any investigation — then proceedings before the ICC are admissible.⁷³ This is precisely what the Ugandan Government has done, writing to the Court on 28 May 2004 to state that:

‘the Government of Uganda has been unable to arrest ... persons who may bear the greatest responsibility’ for the crimes within the referred situation; that ‘the ICC is the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility’ for those crimes; and that the Government of Uganda ‘has not conducted and does not intend to conduct national proceedings in relation to the persons most responsible’.⁷⁴

⁷⁰ See, eg, Claus Kress, ‘“Self-Referrals” and “Waivers of Complementarity”: Some Considerations in Law and Policy’ (2004) 2 *Journal of International Criminal Justice* 944, 946.

⁷¹ *Rome Statute*, above n 3, preamble.

⁷² *Ibid.*

⁷³ Kress, above n 70, 945–6. See also Payam Akhavan, ‘The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court’ (2005) 99 *American Journal of International Law* 403, 412–15.

⁷⁴ *Warrant of Arrest for Joseph Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-53 (issued 8 July 2005) 11.

Critics have argued that the negotiating history of the *Rome Statute* indicates that states did not consider any role for the self-referral of situations by state parties.⁷⁵ Arsanjani H Mahnoush and W Michael Reisman argue that the *Rome Statute* places on the Court, rather than individual state parties, the right to determine whether the latter are unwilling or unable to investigate or prosecute,⁷⁶ and that this power would be removed from the Court were self-referrals permitted.⁷⁷ In further support of their argument, they point to the Statute's emphasis on state participation in combating impunity for international crimes, and cite the Statute's precise and detailed nature as indicating that it was not intended to be subject to wide judicial interpretation.⁷⁸

It might be thought that some of these arguments are less immediately compelling than those put forward by the proponents of self-referrals, as they rely not so much on the text of art 17 of the *Rome Statute* but on considerations of a more general nature.⁷⁹

In its decision on the arrest warrants for the LRA leaders, Pre-Trial Chamber II simply stated that

based upon the application, the evidence and other information submitted by the Prosecutor, and without prejudice to subsequent determination, the case against [the LRA leaders] falls within the jurisdiction of the Court and appears to be admissible ...⁸⁰

In its decision on the Prosecutor's application for the issue of an arrest warrant for the Congolese militia leader Thomas Lubanga,⁸¹ Pre-Trial Chamber I went into considerably more detail. According to the Chamber, a case would be inadmissible if at least one state having jurisdiction was investigating, prosecuting or trying it, or had done so, provided that the relevant state was not unwilling or genuinely unable to conduct national proceedings in relation to the case.⁸² It concluded that no state with jurisdiction over the case against Lubanga was acting, or had acted, in relation to the crimes identified in his arrest warrant: 'Accordingly, in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability'.⁸³

⁷⁵ Mahnoush and Reisman, above n 15, 386.

⁷⁶ Ibid 387.

⁷⁷ Ibid 390.

⁷⁸ Ibid 386–91.

⁷⁹ See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, arts 31–2 (entered into force 27 January 1980).

⁸⁰ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-1-US-Exp (8 July 2005) 2 (Decision on the Prosecutor's Application for Warrants of Arrest under Article 58).

⁸¹ *Prosecutor v Lubanga (Pre-Trial Chamber I) (Annex I)* ICC-01/04-01/06-8-US-Corr (24 February 2006) (Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 concerning the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo).

⁸² Ibid 20 (Annex I [30]–[32]).

⁸³ Ibid 24 (Annex I [40]).

In other words, it seems that if no investigation or prosecution has been initiated, a case cannot be held inadmissible under art 17(1)(a) and (b) of the *Rome Statute*. However, the issue has not yet been put before the Court by an accused or a person for whom a warrant of arrest has been issued.⁸⁴ The question of the admissibility of self-referrals therefore remains open, at least formally.

More substantial, perhaps, are the policy objections to self-referrals. In her article on the subject, Paola Gaeta mentioned two potential problems: first, that governments which self-refer situations might be seeking to use the Court as a 'political weapon' against their opponents; and second, that as a result, such governments might be willing to cooperate with the Court only so far as it scrutinises the activities of their opponents.⁸⁵

Both of these issues have been raised with regard to the investigation of the situation in northern Uganda, and it is to the criticisms of the Court's involvement that this commentary will now turn.

IV CRITICISMS OF THE REFERRAL AND INVESTIGATION

A number of influential groups in northern Uganda have been critical of the ICC's involvement in the conflict.⁸⁶ These criticisms are perhaps best summed up in a joint statement by the Acholi Religious Leaders' Peace Initiative and the Acholi Paramount Chief Elect, Rwot Onen David Acana II, in October 2004:

The ICC should write to both the LRA and the government of Uganda stating clearly its intention to halt any further investigation and prosecution and express its commitments to support the on-going peace process. This will be a concrete step in building confidence and trust on both sides. While we recognise your need to investigate into the crimes committed by the LRA against humanity, we would strongly suggest that the investigation encompasses the whole of the situation of the war in northern Uganda in order for true justice to be done ... We reiterate that the Amnesty Law and Dialogue options are the most relevant solution that befits our current situation. Therefore, the ICC intervention at this particular moment sends conflicting signals to the on-going peace process and could easily jeopardise its success.⁸⁷

As a matter of policy, the OTP does not comment on ongoing investigations. This meant that, at least initially, criticism went publicly unanswered. However, during its investigations the OTP undertook some 20 missions to northern

⁸⁴ *Rome Statute*, above n 3, art 19(2)(a). In *Prosecutor v Lubanga* no challenge was made to the admissibility of the case: *Prosecutor v Lubanga (Pre-Trial Chamber I)* ICC 01/04-01/06-512 (3 October 2006) 5 (Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute).

⁸⁵ Gaeta, above n 16, 951–2.

⁸⁶ For a summary of these criticisms, see Allen, above n 17, 96–127.

⁸⁷ Acholi Religious Leaders Peace Initiative and Acholi Paramount Chief Elect, 'Suggestions by the Acholi Religious and Cultural Leaders in Response to the Request by the International Criminal Court' (Statement, Gulu, 12 November 2004) as reproduced in Tim Allen, *Trial Justice: The International Criminal Court and Lord's Resistance Army* (2006) 86–7. A selection of other criticisms is also provided: at 75.

Uganda to listen to the concerns of victims and local communities.⁸⁸ In March and April 2005, meetings were held in The Hague with local authorities and traditional and religious leaders. According to the Prosecutor, this process has been successful in reaching a ‘consensus that [the Court is] bringing a justice component to a comprehensive effort to achieve justice and reconciliation and bring an end to violence in northern Uganda’.⁸⁹

One might consider that criticisms that the referral has been damaging to the prospects for peace in northern Uganda, cannot properly be addressed to the Court. It was, after all, the Ugandan Government that lodged the referral. Under s 53(1) of the *Rome Statute*, the Prosecutor is obliged to initiate an investigation into a referred situation unless he or she determines that there is ‘no reasonable basis to proceed’. Article 53(1) provides that

[i]n deciding whether to initiate an investigation, the Prosecutor shall consider whether ... [t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

However, in June 2004 — the month in which the Prosecutor’s decision was made — the LRA and the Ugandan Government had not yet entered into negotiations. Although the *Amnesty Act* was in operation, it does not include any truth-telling element, whilst *mato oput* ceremonies have been the result of local initiatives only.⁹⁰ In these circumstances, taking into account the gravity of the crimes alleged against the LRA and the fact that the Ugandan Government supported the opening of an investigation, it is unsurprising that the Prosecutor decided to proceed.

By contrast, criticisms that the Prosecutor has allowed himself to be used as a tool of the Ugandan Government in its struggle against the LRA appear to be more substantial. Certainly the Prosecutor’s decision to hold a press conference jointly with President Museveni to announce the referral immediately gave rise to such suspicions,⁹¹ which were subsequently exacerbated by his failure to charge any members of the UPDF.⁹²

The Prosecutor has explained his decision to target the LRA leaders and not members of the UPDF. The issue of case selection was covered in the 2003 OTP policy paper,⁹³ and the criteria developed in this document were reiterated by the Prosecutor in an address to the 2005 informal meeting of legal advisers of

⁸⁸ Luis Moreno-Ocampo, Chief Prosecutor of the ICC, ‘Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court’ (Statement, Fourth Session of the Assembly of States Parties, 28 November 2005 – 3 December 2005) 2 <http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051128_English.pdf> at 18 May 2007 (‘Statement from 28 November 2005 – 3 December 2005’).

⁸⁹ *Ibid.*

⁹⁰ Allen, above n 17, 132–3.

⁹¹ ICC, ‘President of Uganda Refers Situation concerning the Lord’s Resistance Army (LRA) to the ICC’, above n 2; Allen, above n 17, 96–102.

⁹² Allen, above n 17, 97.

⁹³ ICC-OTP, *Paper on Some Policy Issues*, above n 61, 6–7.

ministries of foreign affairs at the UN in New York:

One of the most important elements of [the OTP's] strategy is to focus investigative and prosecutorial efforts ... on those who bear the greatest responsibility for the most serious crimes. It is simply not feasible to bring charges against all apparent perpetrators.

As such, we will carry out focused investigations and we will prepare for trial a few cases for each situation. Case selection is carried out through careful analysis based on the principles of objectivity and impartiality, and in accordance with the criteria set out in Article 53 of the *Rome Statute*.

Among the most important criteria is gravity ...

In our view, impartiality does not mean that we must necessarily prosecute all groups in a given situation. Impartiality means that we will objectively apply the same criteria for all, in order to determine whether the high thresholds of the Statute are met and our policy of focusing on the persons most responsible is satisfied.⁹⁴

Referring specifically to the situation in northern Uganda, the Prosecutor went on to state that

[i]n Uganda, the criterion for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by all groups — the LRA, the UPDF and other forces. Our investigations indicated that the crimes committed by the LRA were of dramatically higher gravity. We therefore started an investigation of the LRA.

At the same time, we have continued to collect information on allegations concerning all other groups, to determine whether other crimes meet the stringent thresholds of the Statute and our policy are met.⁹⁵

The Prosecutor's comments led to the convening of a status conference by Pre-Trial Chamber II — to which the situation in northern Uganda had been assigned⁹⁶ — on the ground that art 53(2) of the *Rome Statute* requires that if, upon investigation, the Prosecutor considers that there is insufficient basis for a prosecution, the Pre-Trial Chamber shall be informed of his decision and the reasons for it.⁹⁷ In response, the Prosecutor reiterated that the OTP had not closed its investigations: it had simply made an affirmative decision to seek arrest warrants against certain LRA leaders, which did not exclude subsequent

⁹⁴ Luis Moreno-Ocampo, Chief Prosecutor of the ICC, 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court' (Statement, Informal Meeting of Legal Advisors of Ministries of Foreign Affairs, 24 October 2005) 5–6 <http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051024_English.pdf> at 18 May 2007 ('Statement from 24 October 2005'). See also Moreno-Ocampo, 'Statement from 28 November 2005 – 3 December 2005', above n 88, 2 (providing greater detail about the crimes allegedly committed by the LRA during the relevant period).

⁹⁵ Moreno-Ocampo, 'Statement from 24 October 2005', above n 94, 7.

⁹⁶ The situation in northern Uganda was assigned to Pre-Trial Chamber II in a Presidency decision: *Decision Assigning the Situation in Uganda to Pre-Trial Chamber II (Presidency)* ICC-02/04-1 (5 July 2004).

⁹⁷ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-68 (2 December 2005) 4 (Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53).

decisions to charge members of other parties to the conflict.⁹⁸ However, no charges have since been made against members of the UPDF, or any other group, and one might be sceptical as to whether any are likely to be brought at this stage of proceedings.

Of itself, this evidence is not enough to establish bias on the part of the OTP. The crimes alleged against the LRA are more serious than those alleged against the UPDF, and using gravity as the criterion for case selection has much to recommend it. It is specifically mentioned in art 53(1)(c) of the *Rome Statute* as a factor to be taken into account. It provides a relatively precise yardstick, which is likely to become more so as the OTP specifies the standard it is applying when determining severity. As Allison Danner has written:

Although measuring ‘seriousness’ involves philosophical and practical challenges, assessing the harm engendered by a crime is surely a less controversial approach than targeting particular individuals because of their status or nationality. In addition, seriousness of the offense is a commonly accepted criterion for domestic charging decisions. Furthermore, the relative clarity of this standard helps address one of the principal criticisms of prosecutorial guidelines — that they are fundamentally indeterminate.⁹⁹

However, one might ask whether an individual’s nationality, or membership of a particular party to a conflict, should always be irrelevant. If, because one party to a conflict has committed worse atrocities than the other, only members of the former group are prosecuted, a number of undesirable results might ensue. In some cases, it might create an ‘impunity gap’,¹⁰⁰ with the Court prosecuting the worst offenders, who belong to one side in a conflict, while the other side is unwilling to pursue its own offenders, whose crimes the Court does not consider sufficiently serious for it to prosecute. Indeed, both Amnesty International and Human Rights Watch have criticised the Prosecutor on this basis.¹⁰¹ Moreover, public perceptions of the Court are likely to be coloured by whom it chooses to prosecute. If members of only one side of a conflict appear in the dock, their supporters may well consider the Court to be biased against their cause or acting in favour of their opponents.¹⁰² The real issue is perhaps not whether the crimes committed by parties to a conflict are equally serious, but whether they are sufficiently serious for the Prosecutor to intervene.

⁹⁸ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-76 (11 January 2006) 3–4 (OTP Submission Providing Information on Status of the Investigation in Anticipation of the Status Conference to be Held on 13 January 2006).

⁹⁹ Allison Marston Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 *American Journal of International Law* 510, 544 (citation omitted).

¹⁰⁰ ICC-OTP, *Paper on Some Policy Issues*, above n 61, 3, 7.

¹⁰¹ See Amnesty International, ‘Uganda: First Ever Arrest Warrants by International Criminal Court — A First Step towards Addressing Impunity’ (Press Release, 14 October 2005) <<http://news.amnesty.org/index/ENGAFR590082005>> at 18 May 2007; Human Rights Watch, *ICC Takes Decisive Step for Justice in Uganda: Governments Must Cooperate to Ensure Arrest Warrants Are Served* (2005) <<http://hrw.org/english/docs/2005/10/14/uganda11880.htm>> at 18 May 2007.

¹⁰² In September 2006, the OTP issued a report on prosecutorial strategy, which discusses the issue in considerably more detail than had been done previously: ICC-OTP, *Report on Prosecutorial Strategy* (2006) 5–6 <http://www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf> at 18 May 2007.

Interestingly, in its decision on the Prosecutor's application for a warrant of arrest for Thomas Lubanga, the Pre-Trial Chamber I held that the gravity criterion was not a matter of prosecutorial discretion but was, or was also, an issue of admissibility.¹⁰³ Article 17(1)(d) of the *Rome Statute* provides that the Court shall determine that a case is inadmissible if it 'is not of sufficient gravity to justify further action by the Court'. After a lengthy discussion of the provision, the Pre-Trial Chamber I concluded:

Any case arising from an investigation before the Court will meet the gravity threshold provided for in article 17(1)(d) if the following three questions can be answered affirmatively:

- i) Is the conduct which is the object of a case systemic or large-scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct)?;
- ii) Considering the position of the relevant person in the State entity, organization or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation?; and
- iii) Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts and omissions when the State entities, organizations or armed groups to which he belongs commit systematic or large-scale crimes within the jurisdiction of the Court, and (2) the role played by such State entities, organizations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?¹⁰⁴

These criteria seem extremely prescriptive and have the capacity to significantly curtail the Prosecutor's discretion in deciding whom to charge. One might wonder whether art 17(1)(d) really supports such a long list of factors. As yet, however, they have only received the imprimatur of Pre-Trial Chamber I. No such criteria were applied by Pre-Trial Chamber II when deciding to issue the arrest warrants for five leaders of the LRA.

V THE ARREST WARRANTS

Having decided to initiate an investigation, members of the OTP undertook over 50 missions to northern Uganda in a nine month period.¹⁰⁵ On 6 May 2005, their findings led the Prosecutor to apply to Pre-Trial Chamber II for warrants of arrest against Joseph Kony and four other LRA leaders.¹⁰⁶ Arrest warrants can be issued by a pre-trial chamber when there are reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court and the arrest

¹⁰³ *Prosecutor v Lubanga (Pre-Trial Chamber I) (Annex I)* ICC-01/04-01/06-8-US-Corr (24 February 2006) 24–32 (Annex I [41]–[63]) (Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 concerning the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo).

¹⁰⁴ *Ibid* 32.

¹⁰⁵ Moreno-Ocampo, 'Statement from 28 November 2005 – 3 December 2005', above n 88, 2.

¹⁰⁶ See Moreno-Ocampo, 'Statement from 14 October 2005', above n 5.

of the person appears necessary to ensure his or her appearance at trial.¹⁰⁷ By a decision on 8 July 2005,¹⁰⁸ the Chamber acceded to the request.¹⁰⁹

The warrants were issued under seal.¹¹⁰ Both the warrants and requests for arrest and surrender were transmitted to the Government of Uganda, which was asked to treat the requests confidentially.¹¹¹ On 9 September 2005, the Prosecutor made an application to the Chamber seeking the unsealing of the warrants.¹¹² This was superseded by an urgent application made on 26 September 2005 seeking permission for the disclosure, on a confidential basis, of the existence of the warrants and the names of their subjects to the states and international organisations whose cooperation was needed for their execution.¹¹³ The application also requested that the Registry be ordered to transmit requests for arrest and surrender to those states, on the ground that there existed ‘a potentially unique prospect for arresting’ at least some of the subjects of the warrants.¹¹⁴ On 27 September 2005, the Chamber ordered the transmission of requests to the DRC and Sudan.¹¹⁵ However, no arrests followed. Finally, on

¹⁰⁷ *Rome Statute*, above n 3, art 58(1).

¹⁰⁸ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-1-US-Exp (8 July 2005) 2 (Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58).

¹⁰⁹ *Warrant of Arrest for Joseph Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-53 (issued 8 July 2005); *Warrant of Arrest for Vincent Otti (Pre-Trial Chamber II)* ICC-02/04-01/05-54 (issued 8 July 2005); *Warrant of Arrest for Raska Lukwiya (Pre-Trial Chamber II)* ICC-02/04-01/05-55 (issued 8 July 2005); *Warrant of Arrest for Okot Odhiambo (Pre-Trial Chamber II)* ICC-02/04-01/05-56 (issued 8 July 2005); *Warrant of Arrest for Dominic Ongwen (Pre-Trial Chamber II)* ICC-02/04-01/05-57 (issued 8 July 2005).

¹¹⁰ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-52 (13 October 2005) 10 (Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58).

¹¹¹ *Request for Arrest and Surrender of Vincent Otti (Pre-Trial Chamber II)* ICC-02/04-01/05-13 (issued 8 July 2005) 5; *Request for Arrest and Surrender of Raska Lukwiya (Pre-Trial Chamber II)* ICC-02/04-01/05-14 (issued 8 July 2005) 5; *Request for Arrest and Surrender of Okot Odhiambo (Pre-Trial Chamber II)* ICC-02/04-01/05-15 (issued 8 July 2005) 5; *Request for Arrest and Surrender of Dominic Ongwen (Pre-Trial Chamber II)* ICC-02/04-01/05-16 (issued 8 July 2005) 5.

¹¹² *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-136 (9 September 2005) (Application for Unsealing of Warrants of Arrest Issued on 8 July 2005, and Other Related Relief).

¹¹³ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-27-US-Exp (27 September 2005) (Application on Prosecutor’s Urgent Application Dated 26 September 2005).

¹¹⁴ *Ibid* 2. As the application itself remains under seal, no details about this ‘unique prospect’ have entered the public domain.

¹¹⁵ *Ibid* 5. Sudan has signed but not ratified the *Rome Statute*: Amnesty International, *The International Criminal Court: Table of Signatures and Ratifications of the Rome Statute* <http://web.amnesty.org/pages/icc-signatures_ratifications-eng> at 18 May 2007. However, in 2004, the ICC negotiated an agreement with Sudan. The Sudanese Government stated publicly that it would cooperate in arresting and surrendering suspects sought by the Court: Allen, above n 17, 91. The agreement seems never to have been implemented and, given the referral of the situation in Darfur to the ICC by the Security Council in March 2005, further cooperation — at least from the Khartoum Government — can hardly be envisaged: SC Res 1593, 5158th mtg, UN Doc S/RES/1593 (31 March 2005).

13 October 2005, the Chamber ordered the unsealing of the warrants, albeit in a heavily redacted form.¹¹⁶

The warrants charge the LRA leaders with a total of 33 counts of crimes against humanity — sexual enslavement, rape, enslavement, murder and inhumane acts — and war crimes committed in a non-international armed conflict — inducing rape, attacks against the civilian population, enlisting of children, cruel treatment, pillage and murder.¹¹⁷ The offences relate to six attacks by the LRA on IDP camps and other places in northern Uganda during 2003 and 2004, although given that the unsealed versions of the warrants remain heavily redacted, one cannot be certain where and when these events took place.¹¹⁸ The subjects of the warrants are described as members of the LRA 'control altar', the group responsible for devising and implementing LRA strategy.¹¹⁹ Joseph Kony, chairman and commander-in-chief of the LRA, is alleged to have committed, ordered or induced all 33 offences.¹²⁰ Vincent Otti, LRA vice-chairman and second-in-command (and commander of LRA operations in Uganda in 2003–04), is charged with 32 counts;¹²¹ Raska Lukwiya, LRA deputy army commander, with four counts;¹²² Okot Odhiambo, an LRA brigade commander, with 10 counts;¹²³ and Dominic Ongwen, another LRA brigade commander, with seven counts.¹²⁴

It is notable that the arrest warrants categorise the conflict between the Ugandan Government and the LRA as a non-international armed conflict. An argument might be made that the conflict is of an international character: the LRA has based itself not only in northern Uganda but also in Southern Sudan and, more recently, in the DRC.¹²⁵ Moreover, it has received material support

¹¹⁶ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-52 (13 October 2005) (Decision on the Prosecutor's Application for Unsealing the Warrants of Arrest). It has been alleged that this decision was at least partly motivated by the leaking of the arrest warrants' existence: Allen, above n 17, 182–4. Certainly, their existence and the transmission of requests for arrest and surrender to Uganda, the DRC and Sudan had been publicly announced on 7 October 2005 by Amama Mbabazi, the Ugandan Defence Minister: 'Uganda: ICC Issues Arrest Warrants for LRA Leaders', above n 8.

¹¹⁷ *Warrant of Arrest for Joseph Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-53 (issued 8 July 2005) 12–19; *Warrant of Arrest for Vincent Otti (Pre-Trial Chamber II)* ICC-02/04-01/05-54 (issued 8 July 2005) 12–20.

¹¹⁸ *Warrant of Arrest for Joseph Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-53 (issued 8 July 2005) 5–9; *Warrant of Arrest for Vincent Otti (Pre-Trial Chamber II)* ICC-02/04-01/05-54 (issued 8 July 2005) 6–9.

¹¹⁹ *Warrant of Arrest for Joseph Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-53 (issued 8 July 2005) 4.

¹²⁰ *Ibid* 12–19.

¹²¹ *Warrant of Arrest for Vincent Otti (Pre-Trial Chamber II)* ICC-02/04-01/05-54 (issued 8 July 2005) 12–20.

¹²² *Warrant of Arrest for Raska Lukwiya (Pre-Trial Chamber II)* ICC-02/04-01/05-55 (issued 8 July 2005) 8–10. Lukwiya is now deceased: see above n 11.

¹²³ *Warrant of Arrest for Okot Odhiambo (Pre-Trial Chamber II)* ICC-02/04-01/05-56 (issued 8 July 2005) 10–12.

¹²⁴ *Warrant of Arrest for Dominic Ongwen (Pre-Trial Chamber II)* ICC-02/04-01/05-57 (issued 8 July 2005) 8–10.

¹²⁵ The issue of how an armed conflict is to be characterised, and by whom, has arisen in *Prosecutor v Lubanga* before the Pre-Trial Chamber I: *Prosecutor v Lubanga (Pre-Trial Chamber I)* ICC-01/04-01/06-803 (29 January 2007) 60–69 (Décision sur la confirmation des charges).

from the Sudanese Government and has at times allied itself with Khartoum in its struggle against the Sudanese People's Liberation Army.¹²⁶

However, in order to come to such a conclusion, one would have to show that the LRA acted as a de facto organ of Sudan.¹²⁷ Debate exists as to the degree of authority or control a foreign state must have over an insurgent group in order for that group to be classed as de facto state officials. In the *Nicaragua Case*, the International Court of Justice held that 'it would have in principle to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed'.¹²⁸ Conversely, in *Tadic*, the International Criminal Tribunal for the former Yugoslavia propounded a lower standard: whether a state had 'overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations'.¹²⁹ Regardless of the test applied, it does not appear that Sudan exercised a sufficient degree of control over the LRA to be internationally responsible for that group's actions. The evidence indicates that Sudan has only given material support to the LRA, providing it with arms and ammunition, food and medicine.¹³⁰ This is not enough to internationalise the conflict.

VI SUBSEQUENT DEVELOPMENTS

A *At the Court*¹³¹

Beginning with its decision on the arrest warrants, Pre-Trial Chamber II has taken an active part in the proceedings. This has led to tensions with the OTP — which appears to have a rather different view of what it and the Pre-Trial Chamber's respective roles should be¹³² — and considerable procedural skirmishing.¹³³

¹²⁶ Allen, above n 17, 49.

¹²⁷ See *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 6th Comm, 56th sess, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002) [8]; *Prosecutor v Tadic (Appeals Chamber Judgment)* Case No IT-94-1-A (15 July 1999) [84]–[86] ('*Tadic*').

¹²⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1984] ICJ Rep 14, 65.

¹²⁹ *Tadic*, Case No IT-94-1-A (15 July 1999) (emphasis in original).

¹³⁰ See International Crisis Group, *Northern Uganda: Understanding and Solving the Conflict* (ICG Africa Report No 77, 14 April 2004) 7.

¹³¹ For general commentary on proceedings at the Court: see International Bar Association, *IBA Monitoring Report: International Criminal Court* (International Bar Association Human Rights Institute Report, April 2006); International Bar Association, *IBA Monitoring Report: International Criminal Court* (International Bar Association Human Rights Institute Report, September 2006).

¹³² See the comments made by the OTP in relation to Pre-Trial Chamber I's decision to convene a status conference during the investigation of the situation in the DRC: *Situation in Democratic Republic of the Congo (Pre-Trial Chamber II)* ICC-01/04-12-Anx (8 March 2005) 2–3 (Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference).

¹³³ The International Bar Association, which has been monitoring proceedings before the Court, has commented that '[t]here is room for greater clarity between organs of the Court during pre-trial activity with regard to their respective roles': *IBA Monitoring Report: International Criminal Court* (April 2006), above n 131, 14.

In its decision on the arrest warrants, the Chamber rejected the Prosecutor's request that the OTP transmit the warrants and requests for arrest and surrender to the Ugandan Government.¹³⁴ Instead, it gave the task to the Registry, considerably reducing the OTP's control over the timing and manner in which the arrest warrants were disclosed.¹³⁵ The Chamber did state that it did not 'exclude ... under specific and compelling circumstances, the transmission of a particular request for cooperation, or warrant of arrest, and the receipt of responses thereto'.¹³⁶ However, the wording used suggests that such instances will be exceptional, and whether 'specific and compelling circumstances' exist will, of course, be decided by the Pre-Trial Chamber, not by the Prosecutor.¹³⁷ In addition, the Chamber also required the Prosecutor,

[i]n consultation and cooperation with the Registrar and the Victims and Witnesses Unit [of the Registry], to inform the Chamber on a periodic and regular basis as to developments concerning the implementation of protective and security measures [for victims, potential witnesses and their families] in the field ...¹³⁸

The warrants and requests for arrest and surrender were directed to be kept under seal until further order of the Chamber,¹³⁹ implying that such an order would not be forthcoming until the Chamber was satisfied that suitable protective measures were in place.

Prior to the unsealing of warrants, the Chamber held status conferences in order to receive information and clarification from the OTP and the Victim and Witnesses Unit on the status of protection of victims and witnesses.¹⁴⁰ When the Chamber ordered the unsealing of the warrants, it ordered them redacted to an extent differing from that proposed by the Prosecutor.¹⁴¹ Indeed, the Prosecutor applied (albeit unsuccessfully) to the Chamber to request that it 'reconsider its decision to redact from the warrants of arrest the dates, locations and characteristics of the attacks' not least because he had not been heard on the issue.¹⁴² However, the Prosecutor's objections were also grounded on a belief that the OTP's inability to describe the crimes alleged against the LRA leaders would impede its efforts to gain international support for the execution of the warrants.¹⁴³

The Chamber has continued to supervise the progress of the investigation. Following reports in the Ugandan and international media that the LRA had

¹³⁴ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-1-US-Exp (8 July 2005) 8 (Decision on the Prosecutor's Application for Warrants of Arrest under Article 58).

¹³⁵ *Ibid* 4–7.

¹³⁶ *Ibid* 6.

¹³⁷ *Ibid*.

¹³⁸ *Ibid* 10.

¹³⁹ *Ibid*.

¹⁴⁰ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-140 (5 October 2005) (Decision to Convene a Status Conference).

¹⁴¹ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-52 (13 October 2005) 7–10 (Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest).

¹⁴² *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-60 (28 October 2005) 3–4 (Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification).

¹⁴³ *Ibid*.

committed attacks and violence against civilians in northern Uganda and Southern Sudan, it convened a status conference on matters relating to safety and security in Uganda.¹⁴⁴ It also convened a status conference in relation to the application of art 53 of the *Rome Statute*, following public comments by the Prosecutor concerning the investigation.¹⁴⁵ Perhaps most significantly, on 15 September 2006, the Chamber ordered both the Prosecutor and the Registrar to submit information to it on the status of the arrest warrants.¹⁴⁶ It did so on the basis of media reports referring to contact between the Ugandan and Sudanese Government representatives and some of the persons for whose arrest the warrants had been issued.¹⁴⁷ Moreover, the order made mention of art 89 (surrender of persons to the Court) and art 87 (general provisions on requests for cooperation) of the *Rome Statute*, and to the Chamber's duties under Part 9.¹⁴⁸ The latter reference, in particular, would appear to be an implicit reminder that

[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties ...¹⁴⁹

Both the Registrar and the Prosecutor were required to submit reports to the Chamber on the status of the execution of the warrants and the requests for arrest and surrender, in particular as regards to the cooperation with Uganda, the DRC and Sudan, and between the Registry and the OTP.¹⁵⁰ These reports were duly submitted.¹⁵¹ However, it appears that the Chamber was not entirely satisfied with the information received from the OTP, as on 30 November 2006 it made another order for the submission of additional, and very specific, information by the Prosecutor.¹⁵²

¹⁴⁴ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-64 (25 November 2005) 3, 5 (Decision to Convene a Status Conference on Matters Related to Safety and Security in Uganda).

¹⁴⁵ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-68 (2 December 2005) (Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53).

¹⁴⁶ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-111 (15 September 2006) 5–6 (Order to the Registrar and the Prosecutor for the Submission of Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda).

¹⁴⁷ *Ibid* 3.

¹⁴⁸ *Ibid* 3–5.

¹⁴⁹ *Rome Statute*, above n 3, art 87(7).

¹⁵⁰ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-111 (15 September 2006) 5 (Order to the Registrar and the Prosecutor for the Submission of Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda).

¹⁵¹ See *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-118 (6 October 2006) (Rapport du greffier sur l'état d'exécution des mandats d'arrêt dans la situation en Ouganda); *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-116 (6 October 2006) 2 (Submission of Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda).

¹⁵² *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-131 (30 November 2006) 4–5 (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). For the Prosecutor's response, see *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-132 (8 December 2006) (Submission for Additional Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda).

The OTP has sought to challenge the decisions of the Pre-Trial Chamber on several occasions.¹⁵³ It has utilised various procedural means, by stating its 'position' and filing requests for reconsideration and clarification,¹⁵⁴ as well as seeking leave to appeal the Chamber's decision.¹⁵⁵ The Pre-Trial Chamber has refused to entertain any procedural devices other than applications to appeal pursuant to art 82(1)(d) of the *Rome Statute* on the basis that they are not provided for in either the *Rome Statute* or the *Rules of Procedure and Evidence*.¹⁵⁶ The Chamber has also set out criteria by which it will determine whether to grant leave to appeal an interlocutory decision.¹⁵⁷ In its decision of

- ¹⁵³ It has also sought to ensure that it has knowledge of, if not control over, communications made by the Registry to the Pre-Trial Chamber about the case: see *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-66 (30 November 2005) (Application for Clarification of Matter in Relation to 7 December 2005 Status Conference); *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-69 (5 December 2005) (Application for Pre-Trial Chamber II to Supplement the Record with a Description of Informal Communications between Registry and the Chamber). Furthermore, it has challenged the participation of the Senior Legal Adviser to the Pre-Trial Division in the situations in both the DRC and Uganda on the ground that he previously worked for the OTP: *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-10/05-108 (31 August 2006) 2–3 (Prosecutor's Application to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice regarding the Case); and the subsequent decision, *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-124 (31 October 2006) (Decision on the Prosecutor's Request to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice regarding the Case).
- ¹⁵⁴ *Prosecutor v Kony, ICC (Pre-Trial Chamber II)* ICC-02/04-01/05-18-US-Exp (18 July 2005) 2 (Decision on the Prosecutor's Motion for Clarification and Urgent Request for Clarification of the Time-Limit Enshrined in Rule 155); *Prosecutor v Kony, ICC (Pre-Trial Chamber II)* ICC-02/04-01/05-58 (18 October 2005) (Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Actual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification). The OTP also sought to submit a 'motion for reconsideration' to Pre-Trial Chamber II in *Prosecutor v Lubanga (Pre-Trial Chamber I)* ICC-01/04-01/06-120 (22 May 2006) (Motion for Reconsideration).
- ¹⁵⁵ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-20-US-Exp (19 August 2005) (Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Application for Warrants of Arrest under Article 58); *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-90-US-Exp (10 July 2007) (Decision on Prosecutor's Applications for Leave to Appeal Dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006).
- ¹⁵⁶ *Rules of Procedure and Evidence*, ICC-ASP/1/3 (adopted at the First Session of the Assembly of States Parties, New York City, US, 3–10 September 2002). See also the reasoning employed by Steiner J, exercising the functions of the Pre-Trial Chamber pursuant to art 57(2)(b) of the *Rome Statute*, in her decision to reject the Prosecutor's motion to reconsider: *Prosecutor v Lubanga (Pre-Trial Chamber I)* ICC-01/04-01/06-123 (23 May 2006) (Decision on the Prosecution Motion for Reconsideration).
- ¹⁵⁷ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-60 (28 October 2005) 7–8 (Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification). See also *Rome Statute*, above n 3, art 82, which covers all appeals other than those against acquittal, conviction or sentence, which are covered by art 81. Article 82(1)(a) covers decisions in respect of jurisdiction or admissibility; art 82(1)(b) covers decisions granting or denying release of persons being investigated or prosecuted; and art 82(1)(c) covers decisions by pre-trial chambers acting on their own initiative in exercise of art 56(3). Article 82(1)(d), which covers all other interlocutory appeals, provides a right to appeal for:

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

19 August 2005, the Pre-Trial Chamber took a restrictive approach to granting leave on the ground that, as a general principle, appellate proceedings should be deferred until final judgment.¹⁵⁸ Again, it puts pre-trial chambers very much in the driving seat, as parties can only challenge their decisions in very limited circumstances, subject to the leave of the Chamber.¹⁵⁹

At present, the case against the LRA leaders is in a 'maintenance' phase, awaiting the arrest of those accused and their transfer to the Court. The prospect of this happening, however, depends on developments in Uganda and Sudan.

B On the Ground

The Ugandan Government has undoubtedly benefited the most from the referral. It has placed the conflict in northern Uganda on the international agenda, and put pressure on Sudan to end its support for the LRA.¹⁶⁰ Following the implementation of the *Comprehensive Peace Agreement* in Southern Sudan,¹⁶¹ a large group of LRA fighters led by Vincent Otti moved into the DRC in September 2005.¹⁶² Reports also suggest that in 2006, the Sudanese Government finally stopped supplying the LRA.¹⁶³

The most important development, however, has been the opening of peace talks between the Ugandan Government and the LRA. On 16 May 2006, the President of Southern Sudan, Salva Kiir Mayardit, announced that his Government, with the agreement of President Museveni and Joseph Kony, would arrange talks between the parties.¹⁶⁴ Negotiations began in July in Juba, the capital of Southern Sudan.¹⁶⁵ The LRA instituted a unilateral ceasefire, although it has not entirely held.¹⁶⁶ The UN has increasingly involved itself in the negotiations and, on 4 December 2006, the UN Secretary-General named former Mozambican President Joaquim Chissano his Special Envoy for the LRA-affected areas, with a mandate to search for a comprehensive political solution to address the root causes of the conflict, including liaising with the

¹⁵⁸ *Prosecutor v Kony (Pre-Trial Chamber II)* ICC-02/04-01/05-20-US-Exp (19 August 2005) 14 (Decision on the Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58).

¹⁵⁹ Following a refusal by Pre-Trial Chamber I to grant leave, the OTP sought to bypass the requirement by applying directly to the Appeals Chamber for 'extraordinary review'. The Appeal Chamber dismissed the application as 'ill-founded' on the ground that the *Rome Statute* did not provide for such a remedy: *Prosecutor v Lubanga (Appeals Chamber)* ICC-01/04-168 (13 July 2006) 16 (Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal).

¹⁶⁰ See *Situation in the Great Lakes Region*, SC Res 1653, UN SCOR, 5359th mtg, UN Doc S/RES/1653 (27 January 2006); *Reports of the Secretary-General on the Sudan*, SC Res 1663, UN SCOR, 5396th mtg, UN Doc S/RES/1663 (24 March 2006).

¹⁶¹ *Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army*, signed 9 January 2005 <<http://www.unmis.org/English/documents/cpa-en.pdf>> at 18 May 2007.

¹⁶² 'Khartoum's Long Arm', *Africa Confidential* 47(7) (London, UK) 31 March 2006, 6-7.

¹⁶³ 'Troubled Talks', *Africa Confidential* 47(17) (London, UK) 25 August 2006, 8.

¹⁶⁴ 'Taping the LRA', above n 13, 4. Salva is also commander-in-chief of the Sudanese People's Liberation Army and Sudanese First Vice-President.

¹⁶⁵ 'Opening Broadside', *Africa Confidential* 47(15) (London, UK) 21 July 2006, 2.

¹⁶⁶ 'Uganda Rebels Drop Truce Demand', *BBC News* (London, UK) 14 August 2006 <<http://news.bbc.co.uk/2/hi/africa/4790049.stm>> at 18 May 2007.

ICC.¹⁶⁷ In February 2007, however, the LRA threatened to withdraw from the negotiations unless peace talks were moved to a venue outside Sudan.¹⁶⁸

A major demand of the LRA leaders is that the Ugandan Government publicly guarantee that they will not be surrendered to the ICC.¹⁶⁹ Indeed, neither Joseph Kony nor Vincent Otti has been willing to attend the talks in Juba due to fears that they might be arrested if they were to do so.¹⁷⁰ The Ugandan Government appears to be saying one thing to the LRA and another to the ICC.¹⁷¹ It seems increasingly likely that if the talks continue and a peace agreement is reached between the Ugandan Government and the LRA, it will include provisions amnestying the LRA leadership.

This has the potential to cause the ICC severe problems. Two situations can be envisaged. The first is that the Court will simply be bypassed. As Antonio Cassese has written, the ICC is 'a giant without arms and legs — it needs artificial limbs to walk and work. And these artificial limbs are state authorities'.¹⁷² Without its state parties' assistance, it is unlikely that the Court will be able to bring the LRA leaders to justice. Accordingly, the only recourse left to the Court would be to make a finding that Uganda has failed to comply with a request from the Court for its cooperation — preventing the Court from exercising its functions — and refer the matter to the Assembly of States Parties to the *Rome Statute*.¹⁷³ The *Rome Statute*, however, does not provide the Assembly of States Parties with any power to sanction uncooperative state parties.

Consulting the Court might put it in an even more invidious position. The Ugandan Government might approach the Prosecutor to suggest that, given the changed circumstances, he reconsider his position on the basis that a prosecution is no longer in the interests of justice, and that therefore the proceedings against the five LRA commanders should be discontinued.¹⁷⁴

Article 53(2)(c) of the *Rome Statute* allows the Prosecutor to discontinue proceedings if he concludes that:

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 ...

¹⁶⁷ Kofi Annan, UN Secretary-General, *Letter Dated 30 November 2006 from the Secretary-General to the President of the Security Council*, UN SCOR, UN Doc S/2006/930 (1 December 2006).

¹⁶⁸ Xan Rice, 'Uganda Rebels Threaten Return to Battlefield', *Guardian* (London, UK) 7 February 2007, 18.

¹⁶⁹ See, eg, C Opolot, 'LRA Wants Warrants Stopped', *New Vision* (Kampala, Uganda) 20 September 2006 <http://www.newvision.co.ug/D/8/13/522293/LRA_Want> at 18 May 2007.

¹⁷⁰ See, eg, Godfrey Olukya, 'Ugandan Rebel Leader Ready for Peace Talks', *USA Today* (Virginia, US) 20 December 2006 <http://www.usatoday.com/news/world/2006-12-20-uganda-lra_x.htm> at 18 May 2007.

¹⁷¹ See, eg, Vasagar, above n 14.

¹⁷² Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 2, 13. Cassese was referring to the International Criminal Tribunal for the Former Yugoslavia, but his comments are equally, if not more, apposite with regard to the ICC.

¹⁷³ *Rome Statute*, above n 3, art 87(7).

¹⁷⁴ *Ibid* arts 53(2), (4).

The application of this provision to amnesties remains unclear, however, as they receive no specific mention. It appears that this issue was discussed during the negotiation of the *Rome Statute*.¹⁷⁵ South Africa argued that the use of alternative accountability mechanisms, such as its Truth and Reconciliation Commission, should not be viewed as indicating a state's unwillingness to investigate or prosecute crimes within the Court's jurisdiction.¹⁷⁶ While there was wide sympathy for this view, other states were concerned not to legitimise 'self-amnesties', whereby despotic governments grant themselves immunity from prosecution in their domestic courts. Accordingly, no provision on amnesties was included in the *Rome Statute*.¹⁷⁷

A wide range of views have been expressed by commentators about whether and when amnesties are, or should be, permitted — the literature on the subject is immense.¹⁷⁸ Consequently, it is probably best to concentrate on the specific point at issue, that is, the status of national amnesties in international law, not least because it is an issue that has been the subject of recent attention by an international criminal tribunal. In several cases, the Special Court for Sierra Leone has had to consider the effect of the amnesty provisions of the 1999 *Lomé Peace Agreement*,¹⁷⁹ which, it was argued, prevented the Court from exercising its jurisdiction over crimes committed before the date of the Agreement.¹⁸⁰ In *Prosecutor v Kallon and Kamara*, the Special Court's Appeals Chamber found that the *Lomé Peace Agreement* was not an international agreement but was of a domestic character.¹⁸¹ A state may adopt an amnesty as a matter of domestic law but, where the amnesty concerns crimes of universal jurisdiction, its adoption by one state cannot bar other states from exercising jurisdiction over those crimes when appropriate.¹⁸² In other words, national amnesties for international crimes are not prohibited under international law but they cannot prevent other states also having jurisdiction over them.¹⁸³ There may be an exception when states are under an obligation to investigate and prosecute, such as with regard to

¹⁷⁵ See William A Schabas, *An Introduction to the International Criminal Court* (2001) 68–9.

¹⁷⁶ *Ibid* 68.

¹⁷⁷ *Ibid* 68–9.

¹⁷⁸ For a recent examination of the issues, see Leila Nadya Sadat, 'Exile, Amnesties and International Law' (2006) 81 *Notre Dame Law Review* 955. See also Ronald Slye, 'The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' (2002) 43 *Virginia Journal of International Law* 173.

¹⁷⁹ *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone* (signed and entered into force 7 July 1999).

¹⁸⁰ See generally Sarah Williams, 'Amnesties in International Law: The Experience of the Special Court for Sierra Leone' (2005) 5 *Human Rights Law Review* 271. See also Antonio Cassese, 'The Special Court and International Law: The Decision Concerning the *Lomé Agreement* Amnesty' (2004) 2 *Journal of International Criminal Justice* 1130; William A Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 11 *UC Davis Journal of International Law and Policy* 145.

¹⁸¹ *Prosecutor v Kallon (Appeals Chamber)* Case No SCSL-04-15-PT-060 (13 March 2004) [49] (Decision on Challenge to Jurisdiction: *Lomé Accord* Amnesty).

¹⁸² *Ibid* [67].

¹⁸³ See also Antonio Cassese, *International Criminal Law* (2003) 312–16.

genocide¹⁸⁴ and grave breaches of the *Geneva Conventions*.¹⁸⁵

This cannot be said to take matters much further, although it does confirm that national amnesties are not a bar to the ICC's jurisdiction. Article 53(2)(c) of the *Rome Statute* itself is constructed in very broad terms, referring to 'the interests of justice, taking account all the circumstances' of the case. The Prosecutor has not issued any guidelines as to when he considers it might be appropriate to discontinue proceedings. Several commentators, however, have discussed the provision and its applicability to national amnesties,¹⁸⁶ from which some tentative conclusions can be drawn. First and foremost, deference by the Court to national amnesties should be exceptional. As Darryl Robinson writes:

Absent a [Security] Council referral, the ICC can only have jurisdiction relating to civil conflict or repression within a state where that state has ratified the Statute or expressly declared its willingness to have those crimes judged by the ICC. In a sense, the state concerned has entered into a compact with the ICC, specifically mandating the ICC to prosecute wherever the state itself fails to do so. Therefore, arguments that ICC insistence on prosecution may interfere with sovereignty or domestic democratic choices should not be given too much weight, since in reality the state has already specifically contracted with the ICC to perform precisely this function.¹⁸⁷

Second, amnesties for crimes that states have an obligation to investigate and prosecute should not be accepted by the Court. Third, self-amnesties should be viewed with extreme suspicion. Fourth, amnesties for lesser offenders, rather than the persons most responsible, are more acceptable. Finally, in order to be acceptable, amnesties should be accompanied by truth-telling and reconciliation mechanisms.

Applying these criteria to the proposed amnesty for the leadership of the LRA, the following comments can be made. First, the crimes with which they have been charged — crimes against humanity and war crimes committed in a non-international armed conflict — are not ones that states are obliged to prosecute. However, the allegations made against them are serious. Second, any amnesty would not be a self-amnesty but the result of an agreement between the LRA and the Government of Uganda. It also appears that there is support in

¹⁸⁴ *Convention on the Prevention and Prosecution of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277, art 1 (entered into force 12 January 1951).

¹⁸⁵ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31, art 49 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85, art 50 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135, art 129 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287, art 146 (entered into force 21 October 1950).

¹⁸⁶ See, eg, Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice* 695; Declan Roche, 'Truth Commission Amnesties and the International Criminal Court' (2005) 45 *British Journal of Criminology* 565; Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *European Journal of International Law* 481.

¹⁸⁷ Robinson, above n 186, 485–6 (emphases and citations omitted).

northern Uganda for such an amnesty if it will bring peace to the region. Third, such an amnesty would not be only for lesser offenders but would include (indeed, would have been designed specifically to include) those persons most responsible. Fourth, it is unclear to what extent any amnesty would include a truth and reconciliation component. There are strong advocates for such an approach in northern Uganda, but the *Amnesty Act* contained no such component. There is little evidence that amnesty would be acceptable to the LRA leadership, who doubtless feel that they have done nothing which requires forgiveness.

There would thus appear to be arguments both for and against discontinuance of the ICC proceedings. This, however, is likely to be cold comfort for the Prosecutor. Moreover, any decision of the Prosecutor not to proceed could be reviewed by the Pre-Trial Chamber acting *proprio motu* and, in such a case, the Prosecutor's decision would only have effect if confirmed by the Chamber.¹⁸⁸ Given the behaviour of the Pre-Trial Chamber II thus far, one might expect it to be less concerned about the politics of the situation than the Prosecutor. Consequently, even if the Ugandan Government were to persuade the Prosecutor to discontinue proceedings, it might also have to persuade the Pre-Trial Chamber and, moreover, have to seek to do so in open court. Furthermore, if the Court were to take a stand opposed to that of the Ugandan Government, the government's non-cooperation might leave it impotent to act.

The Court, it appears, is on the horns of a dilemma. If it is too assertive, the Court risks being rendered ineffective. If it is too deferential, it risks damage to its credibility. Paradoxically, the best result for the Court might be the failure of the peace negotiations. Whether this would be the best result for the people of northern Uganda might be doubted. What cannot be contested, however, is that the saga strikingly illustrates the complex politics of international criminal justice.

¹⁸⁸ See *Rome Statute*, above n 3, art 53(3)(b).