

Establishing a Precedent in Uganda: The Legitimacy of National Amnesties Under the ICC
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Comment

Abstract

After 14 years of unconscionable wrath against local civilians, including enforced recruitment of thousands of child soldiers, the rebel group The Lord's Resistance Army ("LRA") was offered amnesty by the Ugandan government in 2000. However, as the conflict continued unabated, the Ugandan government, for the first time in the history of the Court, referred its case to the International Criminal Court ("ICC"). The ICC Prosecutor announced the beginning of an investigation and issued warrants for seven top LRA officers in October of 2005. The potential ICC prosecution raises many questions about the jurisdiction of the new court, including whether the Court should defer to national amnesty programs. Some experts argue that a rigid criminal prosecution can prolong a conflict, exacerbates the suffering of the country's citizens, and diminishes the value of future amnesties as peace-building tools. Critics of amnesties, on the other hand, contend that honoring amnesties promotes a culture of impunity and contravenes the obligation of states to prosecute perpetrators of serious international crimes. This Comment holds that although Uganda's amnesty act falls short of the complementarity requirements of Article 17 of the Rome Statute, an analysis of its shortcomings illuminates how a post-conflict state under amnesty legislation can structure an amnesty program that may satisfy Rome Statute requirements. Accordingly, this tragedy presents an opportunity for the ICC and Ugandans to create a template for national amnesty programs, in conjunction with truth commissions, that could both honor the state obligation to prosecute grave crimes while simultaneously preserving the integrity of future amnesty grants.

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Introduction

In 1788 Alexander Hamilton wrote:

“In seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.”¹

Hamilton’s words assert the value of amnesties in internal conflicts.² Over 200 years later, however, granting amnesties is considerably more complex; with the passage of the Rome Statute, national amnesties now must withstand international legal scrutiny.³

The Lord’s Resistance Army (“LRA”), a rebel group belonging to the Acholi tribe of northern Uganda, has waged a brutal war against the Ugandan government for almost 20 years.⁴ The LRA’s political beginnings date from 1986, after a five-year guerilla war between the ethnically-divided north and south, when a southern president, Yoweri Museveni, took power.⁵ As the country’s power shifted dramatically to the south, Museveni’s call for all Acholi soldiers to report to the barracks aroused suspicion, causing many Acholi to flee north into Sudan to form an armed resistance against the government in power.⁶

During nineteen years of wrath, the LRA committed countless atrocities against the civilian population of northern Uganda, including torture and mutilation, abduction, sexual violence, forced recruitment, and murder of suspected government supporters.⁷ The LRA also has engaged in widespread abduction of children; some estimate that LRA rebels have abducted more than 20,000 children, forcing boys to fight as soldiers and girls to serve as sex slaves.⁸ This campaign of terror resulted in over 1.6 million internally displaced persons who now inhabit squalid and dangerous shantytowns.⁹

In an effort to quell the violence, the Ugandan government passed the Amnesty Act in January of 2000.¹⁰ Many considered the amnesty program a success because it encouraged more

than 15,000 rebels to surrender by June 2005.¹¹ The conflict, however, continued to rage,¹² leading to Uganda's referral to the International Criminal Court ("ICC"), pursuant to Article 14 of the Rome Statute.¹³ On July 29, 2004, ICC Prosecutor Luis Moreno-Ocampo found a reasonable basis to investigate Joseph Kony, the LRA's self-proclaimed spiritual leader, and other LRA officers.¹⁴ In response, Acholi leaders, fearing that the investigation and possible prosecution would aggravate the peace process, traveled to The Hague to plead with the ICC to suspend investigations.¹⁵ Nevertheless, on October 14, 2005, the ICC issued warrants for the arrest of Kony and six other top LRA leaders.¹⁶

Uganda's ICC referral raises critical questions concerning when the Court should defer to national prosecutions, truth and reconciliation campaigns, and amnesty programs.¹⁷ Some legal scholars argue that an unrelenting insistence on criminal prosecution where there is an amnesty in place prolongs a conflict, exacerbates the suffering of the country's citizens, aggravates the community's healing and educational needs, and diminishes the value of future amnesties as peace-building tools.¹⁸ Critics of national amnesties respond that honoring amnesties promotes a culture of impunity – effectively “send[ing] a message” to potential brutal regime leaders that they have nothing to lose by instituting repressive measures against their own populations.¹⁹

Textually, the Rome Statute does not foreclose the possibility of deferring to amnesties and alternative justice mechanisms when they are in the “interests of justice.”²⁰ However, although customary international law does not yet forbid amnesty grants for international crimes,²¹ it appears to be moving in this direction.²² Because the ICC has yet to adjudicate upon the tension between its jurisdiction and a national amnesty grant, the efforts of the Prosecutor and the Court in Uganda will likely have potent ramifications in future ICC cases.²³

Part I of this comment explores the effectiveness and legitimacy of prior amnesty programs,²⁴ discusses the basic structure of the Ugandan Amnesty Act,²⁵ and provides an overview to provisions of the Rome Statute that implicate national amnesty programs.²⁶ Part II attempts to reconcile the justice interests of the Rome Statute and the practical goals of the Ugandan amnesty.²⁷ Part III offers recommendations for prosecuting perpetrators in the Ugandan conflict while preserving the integrity of amnesties, thereby building a viable precedent for future cases.²⁸

I. Background

A. Pre-ICC International Jurisprudence

While international treaty law seems to necessitate criminal prosecutions for certain serious crimes,²⁹ it also appears to provide legal encouragement for amnesties in certain contexts.³⁰ The legitimacy of national amnesties under customary international law is equally ambiguous and vigorously debated.³¹ Thus, analysis of past judicial oversight of national amnesties provides needed guidance in future cases.

1. South Africa's Truth and Reconciliation Commission

South Africa's Truth and Reconciliation Commission ("TRC") illustrated the instrumental value of amnesties in the truth-discovery process.³² The South African government authorized the TRC's Amnesty Committee to grant amnesty to perpetrators who had provided full disclosure of the facts of their crimes.³³ Widely acclaimed for its success in providing national reconciliation, the TRC amnesty program proved to be a valuable mechanism in determining responsibility for human rights abuses.³⁴ Two features of the TRC amnesty grant were crucial to its success: it was granted conditionally and only on the basis of individualized application.³⁵

2. The Special Court of Sierra Leone and the Lomé Amnesty Act

In 1999, the Appeals Chamber of the Special Court of Sierra Leone held that the amnesty provision in the Lomé Peace Agreement cannot deprive an international court, such as the Special Court, of jurisdiction over crimes against humanity and war crimes.³⁶ Therefore, Sierra Leone could not legally declare an amnesty for “crimes under international law that are subject of universal jurisdiction.”³⁷ Notably, the Appeals Chamber declared that granting amnesty is a “breach of an obligation of the State towards the international community as a whole.”³⁸

3. Mitigating Sentencing Factors of the ICTY and ICTR

The International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) developed sentencing factors which may become relevant to potential international prosecution in which a perpetrator has surrendered and submitted to the terms of an amnesty legislation.³⁹ Potential mitigating factors for perpetrators include participation in the acts of mercy and assistance to victims,⁴⁰ public expression of remorse and contrition,⁴¹ voluntary surrender,⁴² and cooperation with the Prosecutor.⁴³ However, ad hoc tribunals also considered aggravating factors to a sentence, such as overall gravity of the crime, willingness of participation, membership in extreme organizations, degree of suffering and harm caused to victims, means of killing, crimes that victimize civilians or the young, and the perpetrator’s leadership position.⁴⁴

B. The Ugandan Amnesty Act of 2000

In order to encourage LRA combatants to abandon the insurgency, Uganda passed the Amnesty Act⁴⁵ on January 21, 2000, which led to over 15,000 amnesty grants to surrendering combatants who had engaged in armed rebellion against the government since 1986 and who agreed to renounce and abandon the insurgency.⁴⁶ With a broad mandate to promote

reconciliation, the Act suggested the possibility of instituting a truth-seeking justice mechanism.⁴⁷

Although many foot soldiers – primarily abducted children -- defected, critics viewed the amnesty as a failure because it did not lead to the surrender of LRA leadership or result in the end of the conflict.⁴⁸ The U.N. High Commissioner for Human Rights called for a renunciation of amnesty for LRA leadership accused of serious crimes such as murder, enslavement, torture, rape, and sexual slavery.⁴⁹ In its referral to the ICC, Uganda decided to pursue the Commissioner’s policy and withdrew its offer of amnesty to those high-ranking LRA leaders whom the Prosecutor had indicted.⁵⁰

Based on reports that government combatants, the United Peoples’ Defence Forces (“UPDF”), committed serious crimes against the civilian population, outside observers criticized Uganda’s referral to the ICC for political selectivity.⁵¹ However, in its referral, Museveni agreed to allow the ICC to investigate and prosecute UPDF officials and combatants.⁵²

C. The Rome Statute

With respect to national amnesties, the Rome Statute is textually silent and open to interpretation.⁵³ The preamble of the Rome Statute appears hostile to amnesties for crimes listed in the Statute⁵⁴ while later provisions, notably Article 53, appear to provide the scope for sophisticated, well-tailored amnesty programs.⁵⁵

1. Article 17

Article 17 of the Rome Statute regulates issues of admissibility for the Court.⁵⁶ Specifically, it represents the important principle of “complementarity” – that individual states have the first opportunity to prosecute offenders in their jurisdiction.⁵⁷ The most salient provision to non-prosecutorial situations, Article 17(1)(b) sets strict requirements for the Court to

recognize alternative judicial proceedings, requiring the state to have investigated the case, decided not to prosecute, and that its decision did not result “from the unwillingness or inability of the State genuinely to prosecute.”⁵⁸ Article 17(2)(a) provides guidance for interpreting the “unwillingness” exception of 17(1)(b), allowing admissibility where domestic proceedings are “made for the purpose of shielding the person concerned from criminal responsibility.”⁵⁹

2. Article 53

Article 53(1)(c) of the Rome Statute allows the Prosecutor to decline prosecution when:

“[taking] into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”⁶⁰

Thus the Prosecutor has discretion not to initiate an investigation if it would be inconsistent with the “interests of justice.”⁶¹ Experts disagree as to whether the existence of an amnesty program would fit within the parameters of prosecutorial discretion in the “interests of justice.”⁶²

The ICC Prosecutor also must consider the “interest of victims” when making judgments of who and when to prosecute.⁶³ The relevance of both the “interests of justice” and the “interests of victims” reflects an emerging new order that international justice must engage both victims and perpetrators.⁶⁴ A recent cooperative survey of victims in northern Uganda found that, in order to accept amnesty grantees back into the community, a majority of those surveyed (56%) would require an apology, while a significant percentage (34%) would demand confession.⁶⁵ This information, revealing the true “interests of the victims,” could be factored into the Prosecutor’s consideration of potential prosecutorial targets.⁶⁶

Article 53(2)(c) compels the Prosecutor to consider the “gravity of the crime.”⁶⁷ Human Rights Watch has suggested certain considerations to measure gravity of the crimes: the amount of premeditation, the extent of the crimes, the number of victims, suffering of the victims, and

the heinous means of the crimes.⁶⁸ Article 53(2)(c) also requires the ICC Prosecutor to “[take] into account the age and infirmity of the alleged perpetrator,” ostensibly creating an exception for children, elderly, and drug-influenced combatants.⁶⁹

II. Analysis

The potential conflict between the Ugandan Amnesty Act and the Rome Statute will likely prove challenging for the Court to decide by simple black-letter legal analysis.⁷⁰ Both Article 17 and Article 53 indicate that the Prosecutor and the ICC must interpret justice broadly.⁷¹ In particular, the broad language of Article 53(2)(c) appears to require policy analysis, effectively allowing, or indeed instructing, the Prosecutor to consider the consequences of investigative and prosecutorial choices.⁷² However, it could be argued that Article 17 limits this prosecutorial discretion since Article 53(1)(c) and 53(2)(c) allow the Prosecutor to consider Article 17 inadmissibility criteria in deciding whether to investigate or prosecute a case.⁷³

A. Uganda’s Amnesty Act Would Not Pass the Complementarity Requirement of Article 17

While flexibility to find a case inadmissible under Article 17 is limited,⁷⁴ the Court could nevertheless consider well-tailored alternative approaches that meet strict requirements.⁷⁵ Therefore, only national amnesties that are individually investigative, conditional, and potentially prosecutorial could conceivably pass the complementarity requirement of Article 17.⁷⁶ Although the Amnesty Act clearly falls far short of this requirement,⁷⁷ an analysis of its shortcomings illuminates how a post-conflict state under amnesty legislation can structure an amnesty program/truth commission to potentially satisfy the complementarity requirement of Article 17.

1. Uganda’s Amnesty Act Would Not Meet the Complementarity Requirements of Article 17 Because it Does Not Provide for Individual Investigations

The plain language of Article 17(1)(b), allowing the Court to find a case inadmissible when “[t]he case has been investigated by a State,” implies that the Court can only defer to amnesties when there has been an individual investigation into the facts of a case.⁷⁸ Robust investigations may also refute an “unwillingness” determination under Article 17(2)(a) that the decision was made to shield offenders from criminal responsibility as it suggests that amnesty seekers are individually taking responsibility for their actions.⁷⁹ An issue open to debate, however, is whether the Court will interpret “investigation,” as a conventional criminal investigation, or adopt a broader approach, and read “investigation” to include good-faith, methodical evidence-gathering.⁸⁰ Uganda’s amnesty program would certainly fail both standards because it does not provide for any inquiry consistent with typical criminal investigations.⁸¹

2. Uganda’s Amnesty Act Would Not Meet the Complementarity Requirements of Article 17 Because it is Not Conditional

Article 17(2)(a) instructs the Court to determine “unwillingness,” and find a case admissible if it appears that purpose of the national proceedings, or the decision not to prosecute, is to “[shield] the person concerned from criminal responsibility.”⁸² This provision seems to require conditionality; an amnesty grant contingent on the applicant providing something of community value, as in a “compelling state interest” such as full confession, apology, or financial restitution, may counter contentions of intentional protection of the offender.⁸³ Accordingly, Uganda’s Amnesty Act would fall short of Article 17’s admissibility test because its principal requirement is a pre-existing legal duty – ceasing hostilities.⁸⁴ Since the amnesty should remain contingent on the particularities of each state,⁸⁵ a valid Ugandan amnesty program

would require a community benefit based on Ugandans' stated opinions, such as confessing wrongdoing or apologizing.⁸⁶

3. Uganda's Amnesty Act Would Not Meet the Complementarity Requirements of Article 17 Because it is Not Potentially Prosecutorial

Article 17(1)(b)'s post-investigation requirement that "a State has decided not to prosecute" suggests that there must be a prosecutorial option available to the decision-maker to meet the complementarity regime.⁸⁷ Accordingly, Uganda's Amnesty Act fails this requirement because it lacks any prosecutorial mechanism to adjudicate putative amnesty seekers in criminal proceedings.⁸⁸ One may attempt to characterize amnesty legislation as a "decision" not to prosecute under Article 17(1)(b).⁸⁹ However, even if the Court were to deem the Amnesty Act a "decision" for Article 17 purposes, it may find it nevertheless fails the complementarity requirement of Article 17(1)(b) because it resulted from an "inability" to prosecute, since the legislation effectively barred prosecution.⁹⁰ Furthermore, the Court could also find the Ugandan amnesty "decision" admissible because the Act was a decision based on an "unwillingness" of the Ugandan government to install genuine criminal trials, in that its stated purpose of peace and reconciliation could only be accomplished by shielding offenders from criminal responsibility.⁹¹

B. Article 17 Expressly Limits the Prosecutor to All but the Most Serious Offenses

A general policy of respecting truth commission amnesties, except for a small number of the most serious cases, would be consistent with the mandate of Article 17 and Article 53 for the Court and the Prosecutor to consider the "gravity of the crime."⁹² The Preamble of the Rome Statute declares that "the most serious crimes of concern to the international community as a whole must not go unpunished."⁹³ While emphasizing the imperative to prosecute the most

serious crimes, this provision also provides further scope for prosecutorial discretion in considering the gravity of the crime.⁹⁴

Because prosecutorial resources are sparse in Uganda, and the number of atrocities are so numerous, significant discretion within the Ugandan judicial system seems inevitable.⁹⁵ Furthermore, consideration of the gravity of the offense provides flexibility to prosecute those who played major roles in recruiting child soldiers, a grave offense indeed given the great number of children abducted by the LRA.⁹⁶ In practice, with Kony's cult-like control over the rebels and the terror-induced but tenuous participation of forcibly-recruited child soldiers, isolating LRA' top leaders through arrest may result in a quick collapse of the rebel group.⁹⁷

There is much debate whether to require international accountability under the Rome Statute for perpetrators who capitulated pursuant to amnesty legislation, or to a future truth commission amnesty.⁹⁸ Critically, the value of amnesties would diminish if the Prosecutor could prosecute even those perpetrators to whom a truth commission had already granted amnesty.⁹⁹ Accordingly, with the exception of offenders of serious international crimes, selecting cases to prosecute among those that have either failed to apply for amnesty or those whose amnesty applications have been rejected would be consistent with the Rome Statute and would preserve the integrity of amnesty programs.¹⁰⁰

Some experts who believe that accommodating amnesties may in fact aggravate enduring peace have suggested that the international community's amnesty grant to Turkish officials accused of planning massacres of Armenians during World War I tacitly emboldened Adolf Hitler to engineer the Holocaust with impunity.¹⁰¹ However, if a comparable gross violation of human rights like the Holocaust were to occur today, Article 17's mandate for ICC prosecution of those most responsible for the gravest of crimes would preclude any immunity of high-level

officials and preserve the vital deterrent effect.¹⁰² Thus, this argument fails to fully appreciate the flexible reach of the Rome Statute and its ability to accommodate both justice and peace concerns.¹⁰³

**C. A General Policy of Respecting
Amnesties Would Serve the “Interests of Justice”**

The Rome Statute appears to foreclose the possibility that unconditional amnesties should bar ICC prosecution of perpetrators of serious crimes.¹⁰⁴ However, Article 53 gives the Court and the Prosecutor flexibility to defer prosecution to uphold the “interests of justice.”¹⁰⁵ Specifically, Article 53 links justice principles to specific parameters, including the “gravity of the crime,” the “interests of victims,” and the “age or infirmity of the alleged perpetrator.” Accordingly, justice, and the possibility of ICC prosecution, must be bound to case-related considerations.¹⁰⁶

Justice and amnesty can act as complementary, mutually reinforcing forces.¹⁰⁷ Conditional amnesties provide incentive for both victims¹⁰⁸ – who will likely be attracted to the prospect of receiving financial consideration – and perpetrators¹⁰⁹ – who seek to avoid prosecution – to reconcile. Amnesties founded upon reconciliatory principles and featuring restorative mechanisms, such as South Africa’s TRC amnesty program, can promote justice by redressing a balance through the vindication and restoration of victims.¹¹⁰ Conversely, prosecution is necessary to make the threat of punishment credible, and encourages combatants to apply for amnesty.¹¹¹ In Uganda, where the LRA will be the subject to most investigations, honoring amnesties given to LRA combatants would likely bear reconciliatory benefits by rendering the process less one-sided.¹¹²

The “interests of justice” calculus of Article 53 may also provide scope to for the Prosecutor to consider practical limitations in post-conflict states.¹¹³ Although the Appeals Chamber of the Special Court of Sierra Leone opined that no amnesty grant should bar prosecution for international crimes,¹¹⁴ due to the limited resources of the Special Court, some argued that the Prosecutor gave it virtual de facto approval.¹¹⁵ The Special Court, in its declarations on core principles of customary international law, may have underestimated practical constraints in transitional states.¹¹⁶ This paradoxical result certainly will be relevant to the ICC’s investigation and possible prosecution in Uganda, which will be hampered by similar logistical and financial limitations.¹¹⁷

D. A Ugandan Complementary Truth Commission Would Serve

Both the “Interest of Justice” and the “Interests of the Victims”

As stated above, it would be difficult for a truth commission procedure to satisfy the complementary requirements of Article 17.¹¹⁸ At first glance, Article 17’s strict test suggests that a case before a truth commission will likely remain admissible before the ICC.¹¹⁹ Indeed, the Court may find a case admissible even if the state has investigated and decided not to prosecute, as long as it meets the “unwillingness” requirement of Article 17(2).¹²⁰ However, it is possible that a well-tailored truth commission with similar characteristics to a criminal trial may allow the Prosecutor to find the case inadmissible.¹²¹

If the Court finds a case has failed the complementarity requirements of Article 17, the state could nevertheless argue that prosecutorial discretion, under the broader “interests of justice” analysis of Article 53(2)(c), should preclude ICC prosecution.¹²² In Uganda, alternative justice proponents may maintain, truth commissions can further strengthen the “interests of the victims” of Uganda’s civil war.¹²³ Thus, Article 53 is the most significant mechanism whereby

the Prosecutor could accord deference to alternative reconciliation measures in Uganda, or another post-conflict state.¹²⁴

Ideally, truth commissions serve the “interests of the victims” because they reduce the likelihood of provoking offenders into resuming hostilities in the future.¹²⁵ Further, it is often only through accounts of the war crime perpetrators themselves that families of victims can determine the circumstances and location of their loved ones’ deaths.¹²⁶ Indeed, the prospect of conditional amnesty within a truth commission encourages both surrender and confession.¹²⁷ A system of predominantly criminal trials, in contrast, may have a disempowering effect on victims when such trials deny them an opportunity to tell their complete story.¹²⁸

A truth commission may also serve the “interests of victims” by complementing the prosecutorial mechanisms of the ICC and Ugandan judicial system to create a symbiotic collaborative framework.¹²⁹ A system in which trials are reserved only for serious crimes, allowing truth commissions to settle most disputes, provides accountability for past abuses while also creating a historical record to ensure that the same mistakes are not repeated in the future.¹³⁰

Finally, a truth commission would be especially crucial to the “interests of justice” in Uganda, where the number of child soldiers is overwhelming, by providing an appropriate forum in which to resolve cases involving child combatants.¹³¹ Article 53(2)(c) appears to instruct the ICC prosecutor to use caution when considering prosecution of young and drug-influenced combatants.¹³² Prosecuting children and infirm combatants, even if they have committed serious crimes, may be contrary to the “interests of justice,” and thus outside the reach of ICC prosecution.¹³³

E. ICC Rules of Procedure and Recent International Practice Suggest that the ICC Has the Authority to Consider Sentence Mitigation for Amnesty Holders

Consideration of an offender's surrender to a legitimate amnesty program as a mitigating sentencing factor provides an appropriate compromise between peace and justice necessities and is consistent with the ICC's founding principles.¹³⁴ The ICC's Rules of Procedure and Evidence includes the sentencing factor of "subsequent conduct" of the perpetrator.¹³⁵ Thus, even the capitulation of perpetrators of international crimes pursuant to an amnesty agreement would seem to warrant judicial consideration of sentence mitigation in order to encourage other serious offenders to surrender.¹³⁶

The practices of recent ad hoc courts further supports the legitimacy of mitigating sentences for perpetrators that surrender or otherwise cooperate with the prosecution by accepting an amnesty's terms.¹³⁷ However, when aggravating circumstances are sufficiently compelling, they may outweigh mitigating factors.¹³⁸ This balancing test presents difficulties in Uganda, as those LRA members whose surrender is most vital to peace likely have severe aggravating factors, given the appalling nature of the crimes, the undeniable suffering inflicted on victims, and their high positions of authority in the LRA.¹³⁹ Accordingly, the incentive to surrender under an amnesty deal would evaporate if high-level perpetrators were to face the risk of unmitigated, or indeed aggravated, post-capitulation sentencing.¹⁴⁰

III. Recommendations

The ICC Prosecutor's task of balancing the demands of justice and peace during an on-going conflict, within the scope of an ambiguous statute, will not be easy.¹⁴¹ The most promising solution will hinge on a three-pronged prosecutorial approach involving the ICC, meaningful national prosecutions, and truth commissions.¹⁴² Beyond offenders who have

committed a grave international crime, the Ugandan judicial system should select cases from individuals who failed to apply for amnesty or those amnesty applicants whose application a Ugandan truth commission or court has rejected.¹⁴³

A. Uganda and the ICC Must Collaborate to

Create an Integrated and Effective Criminal Justice System

First, the ICC must prosecute, amnesty or not, those perpetrators of the most serious international crimes,¹⁴⁴ absent special circumstances.¹⁴⁵ Criminal punishment is especially critical for those most responsible for serious international crimes, in order to honor the victims, uphold fundamental values of accountability, and deter potential ringleaders elsewhere.¹⁴⁶ Second, because a lack of resources will limit ICC prosecutions to only a few of the most egregious offenders, it is critical that the Ugandan government pursue lesser violations by both LRA and UPDF offenders.¹⁴⁷ Unlike South Africa, the Ugandan government must vigorously prosecute those who failed to seek, or those who were denied, amnesty.¹⁴⁸ Finally, the international community must provide financial support, in the form of donations, as well as logistical assistance, to ensure that Uganda has adequate resources to bring all serious perpetrators to justice.¹⁴⁹

B. Uganda Must Create an Amnesty-Granting

Truth and Reconciliation Commission

The Ugandan government should institute a truth commission with the power to grant amnesties.¹⁵⁰ Further, it should require perpetrators who voluntarily surrender under an amnesty grant to appear at such a truth commission.¹⁵¹ The truth commissions, however, must not be mere smokescreens that shield wrongdoers from prosecution.¹⁵² Due to the concern that allowing a truth commission to pass evidence collected in the course of its own work to the ICC

may discourage cooperation, the ICC Prosecutor should prohibit the use of such evidence for the indictment of alleged perpetrators.¹⁵³ Lastly, in order to avoid an “unwillingness” determination under Article 17(2)(c), Uganda must ensure that the truth commissions are composed of an impartial, independent, and diverse group of Ugandans, thus including Acholi leaders.¹⁵⁴

C. Uganda Should Create an Amnesty

Program Which Would Satisfy Article 17’s Complementarity Requirements

In order to institute an amnesty program that meets the complementarity requirements of Article 17, Uganda must ensure that it is individualized, which will be crucial to counter the perception that only the LRA were guilty of crimes and allow accountability for UPDF soldiers.¹⁵⁵ Second, consistent with the TRC model, amnesty should be conditional, so that the amnesty seeker must pay for his forgiveness in a manner according with the will of the local community.¹⁵⁶ This would localize the reconciliation process and empower local Ugandans by offering an opportunity to name the price of their own forgiveness.¹⁵⁷ Based on a recent survey, the truth commission should strongly consider requiring perpetrators to confess, apologize, and provide restitution to victims, if possible.¹⁵⁸ Finally, the truth commission must reserve the option of referring any case to either the ICC or Ugandan national courts if the offender does not satisfactorily fulfill the amnesty requirements.¹⁵⁹

D. The ICC and the Ugandan Judicial System Must

Exercise Discretion when Prosecuting Children

Due to children’s undeveloped concept of intent and awareness, providing justice in cases of child soldiers demands a different prosecutorial paradigm.¹⁶⁰ First, for those children under eighteen, the ICC should encourage hearings in separate juvenile chambers or truth commission proceedings.¹⁶¹ Given the staggering percentage of children in LRA’s forces, settling cases

involving children in truth commissions would significantly alleviate the strain on Uganda's criminal justice system.¹⁶² Second, the Prosecutor should assign a specialist in children's rights issues to investigate crimes of child recruitment.¹⁶³ Lastly, amnesty grants must not foreclose prosecution of those whom the Prosecutor suspects of recruiting child soldiers, which would send a potent message to other regimes that seek children as combatants that such practice is intolerable to the international community.¹⁶⁴

E. The ICC Should Allow Mitigated Sentences For Those Perpetrators that Surrender by Complying with the Demands of the Amnesty

Finally, to encourage a peaceful resolution to the conflict, the Court should consider mitigating sentences for perpetrators of even the most serious crimes.¹⁶⁵ To preserve the necessary incentive of an amnesty deal and reduce uncertainty as to the result of surrender, the ICC should give substantial weight to the mitigating factor of voluntary surrender, in addition to other aggravating and mitigating factors.¹⁶⁶ Further, the ICC must improve and clarify its message to local communities, including the LRA, so all Ugandans are aware of the rewards of reconciliation and amnesty, as well as the extent of amnesty coverage.¹⁶⁷ Without such information, insurgent combatants may hesitate to surrender if they fear that they would still be susceptible to prosecution.¹⁶⁸

Conclusion

Although amnesties are generally a political tool for quelling conflicts, with the passage of the Rome Statute, they now must pass more rigid international legal muster.¹⁶⁹ The Statute instructs the Prosecutor and the Court to strike a balance between the restorative needs of transitional societies and international demands of criminal prosecution.¹⁷⁰ Accordingly, the ICC

must proceed with caution before eroding the value of national amnesties.¹⁷¹ Ugandans and ICC officers now have the opportunity to create a future template for an effective dual approach in post-conflict states, combining threats of ICC prosecution with a peace-building national amnesty program.¹⁷² The ICC's determination of the Prosecutor's reach in Uganda will shape the practical workings of the Rome Statute in relation to national amnesties, and carry powerful precedent in future ICC cases.¹⁷³

¹ **The Federalist** No. 74 (Alexander Hamilton).

² See John Dugard, Possible Conflicts of Jurisdiction with Truth Commissions, in **The Rome Statute of the International Criminal Court: A Commentary** 693, 695 (A. Cassese et al. eds., 2002)

(observing that historical tendency of successor leaders to secure peace by pardoning enemies).

³ See Rome Statute of the International Criminal Court, July 17, 1998, pmbl., 2187 U.N.T.S. 90 [hereinafter Rome Statute] (declaring that "it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes"); see also Dugard, supra note 2, at 696 (explaining that the contemporary internationalization of crime has created a virtual duty for states to prosecute leaders of the former regime for certain crimes).

⁴ See Mahnoush H. Arsanjani & Michael Reisman, The Law-in-Action of the International Criminal Court, 99 **Am. J. Int'l L.** 385, 392 (2005) (noting the paradox that most of the LRA's civilian victims are also Acholi).

⁵ See Manisuli Ssenyonjo, Accountability of Non-State Actors in Uganda for War Crimes and Human Right Violations: Between Amnesty and the International Criminal Court, 10 **J. Conflict & Security L.** 405, 409-10 (2005) (remarking that Museveni and his party, the National

Resistance Movement/Army, essentially prohibited the operation of rival political groups after taking power).

⁶ See id. at 410 (adding that several splinter groups of Acholi refugees formed the LRA and began launching attacks into northern Uganda from their bases in southern Sudan in 1988).

⁷ See The International Criminal Court: Catching a Ugandan Monster, **Economist**, Oct. 22, 2005, at 48 [hereinafter Catching a Ugandan Monster] (describing the terror the LRA inflicted on the people of northern Uganda, including its gruesome initiation rites where LRA leaders forced recruits to “club, stamp, and bite to death friends and relatives, sometimes even their own parents, then lick their brains, drink their blood, and even eat their flesh”). Those that have attempted escape have either suffered from similar deaths or “had lips, noses, breasts and limbs hacked off in retribution.” Id.

⁸ See Arsanjani, supra note 4, at 392 (describing the powerlessness of the abducted children, who are forced to stay and fight with the rebels); see also P.W. Singer, Talk is Cheap: Getting Serious About Preventing Child Soldiers, 37 **Cornell Int’l L.J.** 561, 572 (2004) (observing that the LRA, with a core of only 200 believers, has fielded a force of thousands of abducted children, and whose crimes include torturing, raping, and killing children); Ssenyonjo, supra note 5, at 412 (noting that LRA commanders sexually enslave girls, subjecting them to “rape, unwanted pregnancies, and the risk of sexually transmitted diseases, including HIV/AIDS”).

⁹ See International Center for Transitional Justice and the Human Rights Center, University of California, Berkeley, Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda, July, 2005 [hereinafter Forgotten Voices], available at <http://www.reliefweb.int/library/>

documents/2005/hrc-uga-25jul.pdf (last visited Nov. 11, 2005) (remarking that at displacement camps, food, clean water, and medical care is scarce, malnutrition and disease is rampant, and LRA food-seeking attacks are frequent); see also Human Rights Watch, Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda, Vol. 17, No. 12(A), September, 2005 [hereinafter Uprooted and Forgotten], available at <http://hrw.org/reports/2005/uganda0905/uganda0905.pdf> (last visited Oct. 3, 2005) (observing that the Ugandan government's policy of forced displacement in order to remove the population from rebel-infested areas – “draining the sea” – left almost the entire rural population of three districts homeless, resulting in sprawling shantytowns).

¹⁰ See The Amnesty Act, 2000, pt. 2 (Uganda) [hereinafter Amnesty Act], available at www.cr.org/accord/uganda/accord11/downloads/2000_Jan_The_Amnesty_Act.doc (last visited Jan. 24, 2006) (granting immunity to those who participated in the conflict, collaborated with perpetrators, committed any crime in furtherance of the war effort, or aided the conduct of the war, in exchange for the amnesty seeker's surrender and renouncement of the rebellion).

¹¹ See Ssenyonjo, supra note 8, at 421 (noting that as a result of the apparent success of the amnesty legislation, some Ugandan political and religious groups began to support the Amnesty Act as a plausible peace solution). But see Uprooted and Forgotten, supra note 4 (observing that although Ugandan leaders promoted the amnesty as a tool to promote peace and encourage rebels to return home, it lacked a broader reconciliation mechanism such as a truth and reconciliation commission or an award-compensating committee for atrocity victims).

¹² See Ssenyonjo, supra note 8, at 418 (describing the “boomerang effect” of “Operation Iron Fist,” a military tactic in which government troops crossed into Southern Sudan to eliminate the

LRA in March 2002, which paradoxically resulted in an escalation of the conflict and human rights violations when the LRA returned to northern Uganda for retaliatory and food-seeking attacks on the civilian population).

¹³ See Rome Statute, supra note 3, art. 14(1) (permitting state parties to the Rome Statute to refer a situation to the ICC Prosecutor in which crimes within ICC jurisdiction have been committed); see also Dwight G. Newman, The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem, 20 Am. U. Int'l L. Rev. 294, 338-39 (2005) (observing that Uganda first opened the path to international prosecution by amending the amnesty offer to exclude Joseph Kony, and his senior commanders, as provided by the renewal provision of the law); Forgotten Voices, supra note 9, at 47 (noting that ex-LRA combatants account for approximately 6,000 reporters, including a number of senior LRA commanders).

¹⁴ See Press Release, International Criminal Court, Statement by the Chief Prosecutor on the Ugandan Arrest Warrants (Oct. 14, 2005) [hereinafter Arrest Warrants], available at http://www.icc-cpi.int/library/organs/otp/Uganda-_LMO_Speech_14102005.pdf (last visited June 29, 2006) (explaining that the ICC Prosecutor began its investigation with LRA crimes, after an analysis of both LRA and UPDF crimes, because the LRA's crimes were more numerous and of much higher gravity); see also Press Release, International Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda (July 29, 2004), available at <http://www.icc-cpi.int/press/pressreleases/33.html> (last visited June 29, 2006) (announcing the Prosecutor's decision to investigate after thoroughly analyzing available information to ensure that the case satisfied the Rome Statute requirements). See generally Forgotten Voices, supra note 9, at 13 (relating that Kony is known for having

apocalyptic visions, views himself as a divine messenger and liberator of the Acholi, and has created a unique religious ideology, using Christian, Islamic, and animist doctrines).

¹⁵ See Stephanie Nolen, Peace First, Justice Later?, **Globe & Mail**, May 7, 2005, at F9 (stating that although the official purpose of the Acholi delegation visit to the ICC in April 2005 was to learn about the court, Acholi representatives stated that the purpose of the trip was to plead with Moreno-Ocampo to delay investigations as “the mediation was showing the best chances of peace in decades”). But see Moses Odokonyero, Acholi Leaders Support ICC Move On Kony, **Monitor** (Uganda), Oct. 10, 2005 (observing that Acholi leaders have been supportive of the ICC’s issuance of arrest warrants for Kony and five other top LRA leaders because these top LRA officers have as yet failed to surrender).

¹⁶ See Arrest Warrants, supra note 14 (announcing that the ICC has issued arrest warrants, for the first time since its inception, by finding reasonable grounds that Kony, Vincent Otti, his deputy, and three of his other top commanders had committed crimes against humanity and war crimes, including rape, murder, enslavement, sexual enslavement, and forced enlisting of children).

¹⁷ See Newman, supra note 10, at 356 (observing that the Rome Statute’s explicit omission of the legitimacy of amnesties has led to ongoing policy and philosophical debate); see also Thomas H. Clark, Note, The Prosecutor of the International Criminal Court, Amnesties, and the “Interests of Justice”: Striking a Delicate Balance, 4 **Wash. U. Global Stud. L. Rev.** 389, 391 (2005) (observing that there are important unanswered questions concerning the tension between possible national efforts and the Rome Statute).

¹⁸ See Maya Goldstein-Bolocan, Rwandan Gacaca: An Experiment in Transitional Justice, 2004 **J. Disp. Resol.** 355, 361 (2005) (observing that international trials, based on their structural and psychological disconnect from civilian society, suffer from weaknesses that hinder victims

perception of complete justice, thereby aggravating the fostering of democratic values); see also Clark, supra note 17, at 404 (noting that if potential amnesty grantees believed that the grant of amnesty would not immunize them from international prosecution, they will have less incentive to lay down their arms). But see Ken Roth, It's Worth Bringing Tyrants to Justice, **Int'l Herald Trib.**, Aug. 10, 2005 (mentioning that former Yugoslavian President Slobodan Milosevic agreed to end the Bosnian conflict and accept the Dayton Peace Accord without obtaining an amnesty, soon after international calls for prosecution). Further, the threat of ICC prosecution forced oppressive leaders in Sudan and Congo to reform brutal practices in order to avoid the Prosecutor's attention. Id.

¹⁹ See Michael P. Scharf, The Functions of Justice and Anti-Justice in the Peace-Building Process, 35 **Case W. Res. J. Int'l L.** 161, 176 (2003) (maintaining that amnesties do not fulfill the cathartic process of retribution and accountability, but instead lead to acts of revenge). Additionally, the stigmatizing effect of unhindered criminal prosecutions works to isolate and weaken political legitimacy of disruptive actors in the international community. Id. Further, international approval of an amnesty always provides rogue leaders the option of bargaining away their crimes by agreeing to peace. Id. at 188; see also Forgotten Voices, supra note 9 (observing that proponents of ICC intervention believe that the ICC's increased attention on the LRA prompted Sudan to end its support of the LRA and that the opening of investigations might have encouraged the LRA to partake in peace negotiations in 2004). But see Newman, supra note 10, at 354 (suggesting that the argument that ICC prosecution will deter future human rights abuses is diminished when one considers that prosecution does not always yield to a just outcome, given the potential shortages of resources or evidence in transitional countries).

²⁰ See Rome Statute, supra note 3, art. 53(1)(c) (giving the Prosecutor authority to defer an investigation when it would not serve the “interests of justice”).

²¹ See Dugard, supra note 2, at 698 (remarking that modern state practice is filled with examples of amnesty grants by successor regimes instead of prosecution).

²² See Prosecutor v. Kallon & Kamara, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶¶ 87-89 (Mar. 13, 2004) (ruling that the Court may use its discretionary power to attribute little or no weight to amnesty grants like the Amnesty Act which are counter to the direction in which international law is developing). See generally Nancy Kaymar Stafford, A Model War Crimes Court: Sierra Leone, 10 *ILSA J. Int’l & Comp. L.* 117, 131 (2003) (discussing the UN’s contention that states should never use amnesties to absolve perpetrators of crimes including genocide, crimes against humanity, or other serious violations of international humanitarian law).

²³ See Newman, supra note 10, at 343 (stating that although future practice of the ICC may evolve, its early decisions may indeed set a jurisprudential pattern for many years); see also Clark, supra note 17, at 390-92 (highlighting the tension between the conflicting purposes of the Rome Conference – state sovereignty and international accountability).

²⁴ See discussion infra Part I.A (describing recent amnesty grants in two post-conflict societies, South Africa and Sierra Leone).

²⁵ See discussion infra Part I.B (providing a background of Uganda’s amnesty program, and its effect on peace and justice).

²⁶ See discussion infra Part I.C (summarizing the salient provisions of the Rome Statute in the Uganda case – Article 17 and Article 53).

²⁷ See discussion infra Part II (analyzing the conflict and the potential reconciliation between the Rome Statute and Uganda’s Amnesty Act).

²⁸ See discussion infra Part III (proposing a three-pronged prosecutorial approach, utilizing the ICC, national prosecutions, and traditional reconciliation process in order to prosecute those most responsible for war crimes, while simultaneously honoring narrowly-tailored amnesty grants to further reconciliation interests and preserve the values of future amnesty offers).

²⁹ See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. 1 [hereinafter Genocide Convention](affirming that genocide is a crime under international law which contracting parties will undertake to punish).

³⁰ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 6, June 8, 1977, 1125 U.N.T.S. 609 (encouraging authorities to grant the “broadest” possible amnesty in non-international armed conflicts when conflicts cease); see also Newman, supra note 5, at 313 (observing that although the International Committee of the Red Cross has subsequently narrowed this clause's interpretation, its encouragement of amnesties remains intact). But see Vienna Convention, art. 27, May 23, 1969, 1155 U.N.T.S. 331 (declaring that “[a] State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty”).

³¹ See Newman, supra note 5, at 309-10 (citing commentators and courts that dispute the claim that states are obligated to prosecute all incidents of human rights abuses). But see Schabas, supra note 36, at 161 (“the grant of amnesty....is not only incompatible with, but is in breach of an obligation of the State towards the international community as a whole”) (citing Professor Diane Orentlicher in an amicus curiae brief to the Appeals chamber); see also Mahnouch H.

Arsanjani, The International Criminal Court and National Amnesty Laws, 93 **Am. Soc’y Int’l L. Proc.** 65, 66 (1999)(asserting that international scrutiny of domestic legislation is crucial to preventing self-inculpatory amnesty programs).

³² See Truth and Reconciliation Commission of South Africa, Truth and Reconciliation Commission of South Africa Report, vol. 6, § 1, ch. 1, ¶ 25 (2003) [hereinafter TRC Report] (affirming that the amnesty process was crucial in establishing the most complete record of the conflict); see also Erin Daly, Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda, 34 **N.Y.U. J. Int’l L. & Pol.** 355, 386-89 (2002) (contending that the promise of amnesty provided the TRC an effective framework within which to promote the rule of law and democracy).

³³ See TRC Report, supra note 32, vol. 6, § 1, ch. 1, ¶ 25 (stating that “amnesty applicants were legally required to give a full and truthful account of the incidents in respect of which they were seeking amnesty”).

³⁴ See Goldstein-Bolocan, supra note 18, at 364 (noting that the TRC was able to collect testimonies from approximately 24,000 victims of abuses, thereby encouraging large-scale victim catharsis by allowing victims to relate their suffering and promoting the healing effect of uncovering the truth of loved ones’ deaths). However, it is important to note that many commentators criticized the TRC for granting immunity to those responsible for serious crimes, and for failing to provide suitable reparation to apartheid victims. Id. at 366.

³⁵ See Daly, supra note 32, at 364 (suggesting that individualized amnesty ensures accountability for specific acts, similar to a criminal trial). Further, trading amnesty for confessions and information forcing each applicant to pay with the truth, gave the people of South Africa the

opportunity to learn the facts concerning the disappearance of loved ones, and promoted positive post-apartheid values. Id.

³⁶ Se Prosecutor v. Kallon & Kamara, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶ 42 (Mar. 13, 2004) (ruling that the Lomé Agreement, as a peace agreement made in an internal conflict, was not a valid instrument of international law). But see William A. Schabas, Amnesty, The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone, 11 **U.C. Davis J. Int'l L. & Pol'y** 145, 159 (2004) (remarking that the Appeals Chamber found that the Lomé Agreement was not an international instrument despite considerations that the United Nations and other states and organizations participated in the negotiations as “moral guarantors”).

³⁷ Kallon & Kamara, ¶ 71 (reasoning that states cannot unilaterally elect to brush crimes from their collective memory when other states may have jurisdiction based on the erga omnes duty of safeguarding human dignity). The Special Representative of the Secretary General for Sierra Leone raised the UN’s concerns with amnesties that bar prosecution of those responsible for serious international crimes at the time of the agreement. See The Secretary General, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, ¶ 23, delivered to the Security Council, U.N. Doc. S/2000/915 (Oct. 4, 2000) (remarking that the U.N. representative to the Lomé Peace Agreement added a disclaimer to the agreement that the amnesty provision “shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law”).

³⁸ Kallon & Kamara, ¶ 73 (concurring with the opinion in Professor Orentlicher’s amici curiae brief to the Court). But see Schabas, supra note 36, at 161 (asserting that although the Appeals Chamber appeared to be invoking Sierra Leone’s treaty obligations requiring states to extradite

offenders of certain crimes, Sierra Leone's treaty obligations are, in reality, narrow since grave breaches, under the Geneva Conventions, are applicable only to international armed conflict, and are therefore not binding in the Sierra Leonean civil war). Furthermore, Sierra Leone's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is also inapposite because the prosecution did not charge the defendants with torture. *Id.* at 162. Finally, there is no treaty obligation to extradite an accused for violating Articles 2, 3, and 4 of the Special Court's statute. *Id.*

³⁹ See generally W.A. Schabas, *Penalties*, in **The Rome Statute of the International Criminal Court** 1497, 1521 (A. Cassese et al. eds., 2002) [hereinafter *Penalties*] (describing ICC jurisprudence of aggravating and mitigating factors in determining sentences).

⁴⁰ See *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-S, Judgment and Sentence, ¶ 195 (Nov. 13, 2001) (ruling that the actions of the defendant to ameliorate the harsh conditions of a prisoner camp constitutes a mitigating factor).

⁴¹ See *Prosecutor v. Serushago*, Case No. ICTR-98-39-S, Judgment, ¶ 42 (Feb. 5, 1999) (ruling that the defendant's "[p]ublic expression of remorse and contrition" is a mitigating factor and "may afford him some clemency").

⁴² See *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgment, ¶ 23 (Mar. 5, 1998) (sentencing the defendant, who, after voluntarily surrendering, admitted to participating in the summary executions of hundreds of unarmed Bosnian men, to five years imprisonment).

⁴³ See *id.* (finding the "excellent" cooperation of the defendant a considerable mitigating factor when the defendant provided valuable information of incidents unknown to the Prosecution while demanding for nothing in return).

⁴⁴ See Penalties, supra note 39, at 1524 (listing ad tribunals findings of aggravating factors to sentencing war crimes).

⁴⁵ See Amnesty Act, supra note 10, pt. 2 (granting immunity to those who participated in the conflict, collaborated with perpetrators, committed any crime in furtherance of the war, or aided the conduct of the war).

⁴⁶ See Forgotten Voices, supra note 9, at 17 (noting that although the Amnesty Commission granted amnesties to those who agreed to renounce and abandon the rebellion, it lacked any investigative capacity as it did not require combatants to specify the nature of the crime that they committed). Further, in order to encourage combatants to surrender without fear of prosecution and put an end to the conflict, the Act mandated that amnesty applicants would receive resettlement packages including food, tools, and other supplies. Id. at 47. But see Uprooted and Forgotten, supra note 4, at 1 (reporting that some estimate that 10,000 of the 15,000 amnesty grantees had not received their resettlement packages).

⁴⁷ See Amnesty Act, supra note 10, §§ 9(c),(d),(e) (calling for the Amnesty Commission to “consider and promote appropriate reconciliation mechanisms in the affected areas,” “promote dialogue and reconciliation within the spirit of the Act,” and to “perform any other function that is associated or connected with the execution of the functions stipulated in the Act”).

⁴⁸ See Forgotten Voices, supra note 9, at 49 (remarking that there are doubts whether there are adequate incentives for unskilled LRA members to surrender and re-enter Ugandan society, forsaking the material goods, status, and power that they enjoy in the bush). Further, the LRA has proven to be stubbornly resistant because it has collected arms stockpiles from stolen weapons of military barracks, and has expertise in waging guerilla warfare, moving in small groups to avoid UPDF helicopters. Id. at 15.

⁴⁹ See U.N. High Commissioner for Human Rights, Report on the Mission Undertaken by Her Office, Pursuant to Commission Resolution 2000/60, to Assess the Situation on the Ground with Regard to the Abduction of Children from Northern Uganda, ¶¶ 12-13, UN Doc.

E/CN.4/2002/86 (April 26, 2000) [hereinafter UNHCHR Report] (concluding that the international community must attempt to isolate top LRA leadership by holding it accountable for serious crimes).

⁵⁰ See Press Release, International Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004) (announcing that President Museveni's intention to amend the amnesty to exclude LRA leadership).

⁵¹ See id. at 411 (noting Human Rights Watch's advocacy for the ICC to scrutinize UPDF soldiers, in addition to LRA offenders); see also Uprooted and Forgotten, *supra* note 9, at 4-7 (highlighting incidents of beatings and rapes by government soldiers in resettlement camps that have received inadequate response and ineffective remedies by the Ugandan government).

⁵² See Remarks by ICC Prosecutor Luis Moreno-Ocampo at the 27th Meeting of the Committee of Legal Advisors on Public International Law (Mar. 18, 2004), available at

<http://www.iccnw.org/documents/ICCProsecutorCADHI18Mar04.pdf>

(last visited June 29, 2006) ("I am ready to be prosecuted for any crimes ... and if any of our people were involved in any crimes, we will give him up to be tried by the ICC"(quoting

President Museveni)); see also 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, 411 (2005) (noting that Ugandan leaders knew referring the LRA situation to the ICC would submitting to potential international judicial scrutiny).

⁵³ See Declan Roche, Truth Commission, Amnesties, and the International Criminal Court, 45 **Brit. J. Criminology** 565, 565 (2005) (illuminating the apparent interpretive contradiction of the Rome Statute which supports one interpretation in which a prosecutorial policy must ignore amnesties, and another, in which the Prosecutor must adopt a cooperative approach with truth commissions that can demonstrate their legitimacy). See generally Clark, supra note 17, at 390 (explaining the ideological battle at the Rome Conference between those who emphasized the state obligation to prosecute international crimes and those who stressed state sovereignty created a desire to create flexibility to allow alternative justice mechanisms, such as amnesties, in certain circumstances). This tension thus resulted in a system in which the Prosecutor exercises discretion in a framework of purposefully vague provisions. Id.

⁵⁴ See Rome Statute, supra note 3, pmb1. (affirming that the most serious international crimes must be prosecuted and punished).

⁵⁵ See id. art. 53(1)(c),(2)(c) (instructing the Prosecutor to consider the “interests of justice” and “all the circumstances” when deciding whether to investigate and prosecute); see also Carsten Stahn, Complementarity, Amnesties and Alternate Forms of Justice: Some Interpretive Guidelines for the International Criminal Court, 3 **J. Int’l Crim. Just.**, 695, 698 (2005) (explaining that the ICC Prosecutor may invoke “the interests of justice” provision of Article 53 to legitimize departures from traditional prosecution based on both amnesties and alternative justice-seeking proceedings).

⁵⁶ See Rome Statute, supra note 3, art. 17(1) (describing conditions in which a Court shall determine that a case is inadmissible); see also Roche, supra note 53, at 568 (observing that the Article 17 admissibility test is founded upon the principle that the ICC’s purpose is merely to complement domestic proceedings).

⁵⁷ See Rome Statute, supra note 3, art. 17(1)(a) (declaring that the Court shall determine that a case is inadmissible where a state with jurisdiction has investigated or prosecuted the case); see also Darryl Robinson, Serving the Interests of Justice: Amnesties, Truth Commissions, and the International Criminal Court, 14 **Eur. J. Int'l L.** 481, 498 (2003) (remarking that the scope of the complementarity regime is somewhat narrow as it looks to whether the state has conducted a “genuine proceeding”).

⁵⁸ See Rome Statute, supra note 3, art. 17(1)(b); see also Stahn, supra note 55, at 710 (describing a tripartite test, allowing exemption criminal responsibility through an alternate justice form “only if it is accompanied by alternative forms of justice” and is “open to individualized sanction, including the possibility of criminal punishment”).

⁵⁹ See Rome Statute, supra note 3, art. 17(2)(a); see also Stahn, supra note 55, at 714 (suggesting that the drafters of Article 17(2)(a) intended this provision to prevent sham proceedings so that perpetrators may not immune themselves from criminal responsibility).

⁶⁰ See Rome Statute, supra note 3, art. 53(1)(c) (mandating that “if the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber”).

⁶¹ See Rome Statute, supra note 3, art. 53(1)(c); see also Human Rights Watch, Policy Paper: The Meaning of the “Interests of Justice” in Article 53 of the Rome Statute, June, 2005 [hereinafter Policy Paper], available at <http://hrw.org/campaigns/icc/docs/ij070505.pdf> (last visited Nov. 21, 2005) (highlighting the importance of properly interpreting the phrase “interests of justice” as the Prosecutor has suggested that he may invoke this clause to suspend an investigation).

⁶² See Policy Paper, supra note 61, at 2-4 (advocating a narrow construction of “the interests of justice” to adhere to the context, object, and purpose of the Rome Statute, and to international

law requirements). But see Newman, supra note 5, at 350 (maintaining that a strict reading of the Statute interpreted to prohibit amnesties will generate increased distributive costs for conflict-ridden states, to the benefit of other countries).

⁶³ See Rome Statute, supra note 3, art. 53(2)(c); see also Stahn, supra note 55, at 698 (distinguishing between the specific criteria of the “interests of victims” and the broader notion of the “interests of justice”).

⁶⁴ See Daly, supra note 32, at 134 (illustrating that South Africa’s TRC offered transformative justice by transforming both the victims, in their empowering search of the truth, as well as the perpetrators, in their attempts to absolve themselves of anxiety and guilt by confessing and providing information and assistance to the TRC).

⁶⁵ See Forgotten Voices, supra note 9, at 29 (listing Ugandan victims’ requirement for amnesty grantees before being accepted back into the community). Importantly, 79% of respondents stated that they would accept lower-ranking LRA members back into the community. Id.

⁶⁶ See Rome Statute, supra note 3, art. 53(2)(c) (stating that there may be no basis for prosecution if the Prosecutor finds that such prosecution is not in the “interests of the victims”); see also Forgotten Voices, supra note 9, at 39-40 (concluding that most affected people of northern Uganda had immediate needs for peace and food, did not regard peace and justice as mutually exclusive, and favored some form of accountability for LRA members responsible for atrocities).

⁶⁷ See Rome Statute, supra note 3, art. 53(2)(c) (mandating that the Prosecutor consider certain circumstances, including the gravity of crime, in assessing the “interests of justice” for a potential prosecution).

⁶⁸ See Policy Paper, supra note 61, at 16-17 (incorporating case law from the ICTR and ICTY in the context of evaluating crimes for sentencing purposes).

⁶⁹ See Rome Statute, supra note 3, art. 53(2)(c); see also Policy Paper, supra note 61, at 17 (proposing mitigating factors for sentencing: (1) “the young age of the accused”; (2) “the poor health of the accused”; and (3) “the advanced age of the accused”).

⁷⁰ See discussion supra Part II; see also Arsanjani, supra note 4, at 65 (observing that these conflicts are more real than theoretical, involving “fundamental question[s] of policy with far-reaching implications for the international human rights program and the maintenance of public order”).

⁷¹ See Stahn, supra note 55, at 698 (arguing that the express distinction in the language of Article 53(2)(c) – based on “all the circumstances, including” – suggests that the “interests of justice” may provide for a broad concept of justice, allowing a departure from traditional prosecution).

⁷² See Rome Statute, supra note 3, art. 53(2) (mandating the ICC Prosecutor, in determining what perpetrator to sue, consider the “interests of justice,” “all the circumstances,” “the gravity of the crime,” and “the interests of the victims”); see also Arsanjani, supra note 4, at 66 (noting that legal experts cannot analyze the jurisdiction of the ICC by mere legal analysis as such questions involve fundamental policy issues with salient implications for human rights efforts, and local politics).

⁷³ See Rome Statute, supra note 3, art. 53(1)(b), (c) (instructing the Prosecutor to consider whether the case would be admissible under Article 17 when determining whether to initiate an investigation or prosecution); see also Stahn, supra note 55, at 717 (arguing that due to Article 17 constraints, Article 53’s allowance of broad prosecutorial discretion is in fact not as broad as many believe).

⁷⁴ See Stahn, supra note 55, at 709 (introducing two limiting elements of Article 17: an initial presumption in favor of admissibility, and a high threshold for inadmissibility for cases in which admissibility is in question).

⁷⁵ See Robinson, supra note 57, at 502 (noting that for the Court to allow alternative methods of justice, the procedure must be qualitatively similar to genuine prosecution).

⁷⁶ See Stahn, supra note 55, at 711-12 (arguing that a state could satisfy Article 17 complementarity requirements when alternative justice forums can recommend prosecution following proceedings, while reserving the authority to deny amnesties after a complete factual investigation).

⁷⁷ See Amnesty Act, supra note 10, pt. 2 (granting immunity to all perpetrators, without requiring offenders to state their crime or performing investigative function).

⁷⁸ See Rome Statute, supra note 3, art. 17(1)(b); see also Stahn, supra note 55, at 710 (observing that the underlying principle of Article 17 is that amnesties must be accompanied by some inquiry mechanisms into the crime of the putative offender).

⁷⁹ See Rome Statute, supra note 3, art. 17(1)(b), 17(2)(a); see also Jeremy Sarkin & Erin Daly, Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies, 35 **Colum. Hum. Rts. L. Rev.** 661, 721 (2004) (noting that individual amnesties are more likely to overcome suspicions of impunity).

⁸⁰ See Rome Statute, supra note 3, art. 17(1)(b); see also Robinson, supra note 57, at 500 (remarking that an interpretation of “investigation” to be a criminal investigation would only allow deference to truth and reconciliation efforts under the “interests of justice” analysis of Article 53); Stahn, supra note 55, at 711 (arguing that a broader reading of Article 17 would likely allow truth and reconciliation programs in the mold of the South African TRC, in which a

commission may absolve an offender only if it conditioned exemption from criminal responsibility upon testimony as to the facts of the crime and the offender's own conduct).

⁸¹ See Amnesty Act, supra note 10, pt. 2 (merely requiring an amnesty seeker to report to the authorities, renounce involvement in the hostilities, and surrender weapons); see also Robinson, supra note 57, at 500 (maintaining that the Court could find a valid investigation when it is based on certain criteria, such as sufficiency of evidence, seriousness of the conduct, and role of the perpetrator).

⁸² See Rome Statute, supra note 3, art. 17(2)(a); see also Sarkin, supra note 79, at 709 (asserting that in order to meet the high threshold of inadmissibility, a state must satisfy Article 17(b)'s strict conditions).

⁸³ See Rome Statute, supra note 3, art. 17(2)(a); see also Arsanjani, supra note 4, at 66 (contending that conditional amnesty enforces the perception of amnesty as a contract – valid only to the extent that both parties comply with its terms); Sarkin, supra note 79, at 721 (remarking that only conditional amnesties, in which a state exchanges its discretion to punish for a compelling state interest, will sufficiently link the non-punishment of crimes and democracy); Stahn, supra note 55, at 714 (remarking that a Peruvian amnesty law which barred investigation and prosecution of members of its military forces would likely not meet the Article 17(2)(a) requirement because it infers a state's intent to “shield” from criminal responsibility). Some experts maintain that Article 17(1)(b)'s mandate that a state, in order to satisfy complementarity, “decided” not to prosecute also implies that amnesty grants must be conditional upon the completion of a specific procedure, allowing the decision maker to determine if the offender has met certain criteria to be exempted from criminal responsibility.

See Stahn, supra note 55, at 712.

⁸⁴ See Rome Statute, supra note 3, art. 17; see also Amnesty Act, supra note 10, pt. 2 (granting immunity in exchange for the amnesty seeker’s surrender and renouncement of the rebellion); Sarkin, supra note 79, at 721 (arguing that a state should not grant amnesty for nothing, or in return for a pre-existing legal duty, like obeying the law).

⁸⁵ See TRC Report, supra note 32, vol. 6, § 1, ch. 5, ¶ 1 (remarking that the South African largely successful amnesty process was not blanket but conditional, requiring that offenders publicly declare human rights violations before they could receive an amnesty grant); see also Stahn, supra note 55, at 721 (remarking that as each state’s circumstances and conditions will be unique, the country should determine on its own compelling state interests).

⁸⁶ See Forgotten Voices, supra note 9, at 29 (finding that 56% of Ugandans would require apologies from amnestied individuals, while 34% would demand that the perpetrator confess to their wrongdoing before accepting them back into the community).

⁸⁷ See Rome Statute, supra note 3, art. 17(1)(b); see also Robinson, supra note 57, at 500 (observing that it would be inaccurate to deem a prosecution barred by legislation as a “decision” not to prosecute); Stahn, supra note 55, at 711-23 (observing that alternative forums of justice with the power to recommend judicial prosecution and deny amnesties after the completion of a investigative procedure would likely meet the requirements of the Article 17(2)).

⁸⁸ See Amnesty Act, supra note 10, pt. 2 (permitting the Minister to give a Certification of Amnesty without any investigative mechanisms into the facts of the offender’s crimes).

⁸⁹ See Robinson, supra note 57, at 501 (observing that even if one called a legislative amnesty as a “decision,” it would be difficult to refute the fact that the state’s intent was to shield perpetrators).

⁹⁰ See Amnesty Act, supra note 10, pt. 2 (prohibiting prosecution or “any form of punishment” of those offenders who sought, and were granted, amnesty).

⁹¹ See Amnesty Act, supra note 10, pmb. (declaring that it is the desire of the government to implement its amnesty policy in order to “establish peace, security, and tranquility throughout the country”); see also Robinson, supra note 57, at 501 (remarking that even if one characterized the principal intent of an amnesty program as to promote reconciliation, the means of such an act are certainly, at least in large part, to shield perpetrators).

⁹² See Rome Statue, supra note 3, arts. 17(1)(d), 53(2)(c); see also Stahn, supra note 55, at 707 (asserting that since the “gravity of the crime” is a guiding factor in both the admissibility test of Article 17(1)(d) and the Prosecutor’s assessment to investigate and prosecute under Article 53, there is room to differentiate between more serious and less serious crimes).

⁹³ See Rome Statute, supra note 3, pmb.

⁹⁴ See Stahn, supra note 55, at 708 (setting forth the limitations to international criminal prosecution in the ad hoc tribunals of Yugoslavia and Rwanda).

⁹⁵ See Uprooted and Forgotten, supra note 4, at 8 (describing the insufficient resources of the Ugandan legal system, including understaffed courts, inexperienced judges, the dearth of qualified lawyers in Gulu, and the prohibitive costs of private litigation). But see Akhavan, supra note 52, at 415 (observing that Uganda still possesses a viable and independent judicial system).

⁹⁶ See Rome Statue, supra note 3, art. 53(2)(c).

⁹⁷ See Akhavan, supra note 52, at 420 (noting the immediate tangible consequences of the ICC’s threats of prosecution to the top LRA leadership).

⁹⁸ See Ssenyonjo, supra note 8, at 427 (remarking that if the ICC were to take precedence over Ugandan national laws, even amnesty grantees could be subject to ICC prosecution, rendering the Amnesty Act ineffectual).

⁹⁹ See Roche, supra note 53, at 574 (noting that perpetrators who are aware that any admission could become the basis of an ICC prosecution may gain an additional incentive to forsake an amnesty and continue fighting).

¹⁰⁰ See id. (suggesting that withholding prosecuting to perpetrators who have already been granted amnesty would make amnesties more valuable, solidifying the amnesties' value); see also Ssenyonjo, supra note 8, at 427 (recommending that the ICC, given its mandate of ending impunity of perpetrators of international crimes, must bring to justice LRA's top officers who are responsible for committing the gravest crimes).

¹⁰¹ See Scharf, supra note 19, at 188 (arguing that the failure to prosecute the Armenian massacre sent a message to the Nazis that they could effectively get away with genocidal policies).

¹⁰² See Rome Statute, supra note 3, art. 17.

¹⁰³ See id. art. 53(1)(c) (mandating the Prosecutor to consider the "gravity of the crime" in determining whether to initiate an investigation); see also Clark, supra note 17, at 389 (stating that the ICC is determined to end impunity for perpetrators of genocide, war crimes, and crimes against humanity by requiring the Prosecutor to take cases even when states are reluctant to do so on their own).

¹⁰⁴ See Rome Statute, supra note 3, art. 53(2)(c); see also Stahn, supra note 55, at 718 (arguing that the Court will likely determine that validation of an automatic amnesty for the most serious perpetrators is contrary to the purpose of the Rome Statute).

¹⁰⁵ See Rome Statute, supra note 3, art. 53; see also Stahn, supra note 55, at 717 (stating the principle of Article 17 is that there must be unusual circumstances to defer investigations or prosecutions).

¹⁰⁶ See Rome Statute, supra note 3, art. 17(2)(c); see also Stahn, supra note 55, at 718 (concluding that it is unlikely that drafters of the Rome Statute intended Article 53 to allow general consideration of national reconciliation or peacemaking goals).

¹⁰⁷ See Sarkin, supra note 79, at 691-92 (positing that reconciliation enhances justice insofar as authentic reconciliation allows similar results as does punitive justice – vindication and restitution); see also Erin Daly, Transformative Justice: Charting a Path to Reconciliation, 12 **Int'l Legal Persp.** 73, 133 (2002) (observing that since justice requires truth and truth requires the promise of amnesty, amnesty is indeed an essential part of justice).

¹⁰⁸ See Roche, supra note 53, at 578 (noting that one of the principal factors encouraging apartheid victims to seek justice within the South African TRC was the prospect of financial reparation).

¹⁰⁹ See Daly, supra note 107, at 132 (explaining South Africa's Constitutional Court's reasoning for upholding the TRC's amnesty provision: offenders are given the necessary incentive to come forward with the truth, which victims seek so desperately, with the knowledge that they will be immune from punishment).

¹¹⁰ See Sarkin, supra note 79, at 692 (stating that broader notions of justice and reconciliation can lead to healing, both on a societal and individual level).

¹¹¹ See Daly, supra note 109, at 133 (pointing out that offenders would have no incentive to apply for amnesty without the specter of criminal prosecution, as evidenced by perpetrators who abstained from amnesty in South Africa).

¹¹² See Sarkin, supra note 79, at 694 (observing that prosecutorial discretion would benefit reconciliation in a post-conflict state where the judicial system would prosecute members of only group).

¹¹³ See Rome Statute, supra note 3, art. 53(2)(c) (ordering the Prosecutor to consider “all the circumstances” when deciding whether prosecuting a case would be “in the interests of justice”).

¹¹⁴ See Prosecutor v. Kallon & Kamara, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶ 71 (Mar. 13, 2004) (maintaining that states may not grant amnesty for crimes of international jurisdiction).

¹¹⁵ See id. ¶ 59 (relating the Defense’s argument that the Prosecutor may have offered de facto immunity to some individuals who allegedly committed similar crimes as the defendants as a result of their cooperation with the Prosecutor); see also Schabas, supra note 36, at 166 (observing that the Special Court’s modest budget, temporal restrictions to acts committed after November of 1996, and limited jurisdiction against those that “bear the greatest responsibility for serious violations,” suggested that the United Nations was effectively encouraging amnesty for the majority of perpetrators).

¹¹⁶ See Schabas, supra note 36, at 166 (remarking that in a conflict in which thousands of individuals were likely guilty of committing inhumane acts, the difference between the position of the United Nations and that manifested in the Lomé Agreement amounted to only several individuals).

¹¹⁷ See generally Uprooted and Forgotten, supra note 4, at 7-11 (describing the limited judicial resources of northern Uganda, including understaffed courts, lack of police presence, and shortage of qualified lawyers).

¹¹⁸ See Robinson, supra note 57, at 505 (noting that in order for an alternative procedure to meet the complementarity test, it would have to be a sophisticated procedure with certain prosecutorial features).

¹¹⁹ See Rome Statute, supra note 3, art. 17(1)(a),(b); see also Roche, supra note 53, at 568 (observing that even if the ICC finds that a truth commission is an investigation, it does not necessarily constitute a formal prosecution).

¹²⁰ See Rome Statute, supra note 3, art. 17(2) (ordering the Court, in determining unwillingness, to consider whether one or more of the following factors are present: the proceedings were undertaken “for the purpose of shielding the person concerned from criminal responsibility,” there was an “unjustified delay in the proceedings,” or the proceedings were not “conducted independently or impartially”).

¹²¹ See Stahn, supra note 55, at 710 (interpreting Article 17’s clauses foreclosing prosecution where “the case has been investigated by a State...and the State has decided not to prosecute the person concerned” as perhaps providing room for inadmissibility when a truth commission has investigated a crime or where criminal proceedings lead to symbolic punishment); see Roche, supra note 53, at 568 (maintaining that truth commissions are not based on an “unwillingness” to prosecute because their purpose, it can be argued, is to promote the restorative concept of justice through the uncovering of the truth and reconciliatory necessities). But see Dugard, supra note 3, at 702 (arguing that it is difficult to argue that a state’s decision to forego prosecution and grant amnesty after an investigation did not result from prosecutorial “unwillingness” when the state in fact decided not to prosecute).

¹²² See Roche, supra note 53, at 568-69 (remarking that given the formidable challenges facing post-conflict societies, states who choose to institute a truth commission may decide to exchange

some retributive justice – at least to those offenders to whom a judicial body has granted legitimate amnesty – in order to promote other important objectives, including “uncovering the truth, assisting victims, and promoting reconciliation and reconstruction”).

¹²³ See Goldstein-Bolocan, supra note 18, at 364 (explaining that the TRC’s narrative process “gave victims a chance to relate their suffering, thus providing them with the specific acknowledgment and vindication they had long been denied and in most cases, with cathartic and psychologically beneficial effects”). But see Policy Paper, supra note 61, at 19 (arguing that the ICC must only consider the victims’ interests as they relate to the purposes of Article 53 – including determining the identities of the perpetrators, hearing the perpetrator’s explanation, and seeing perpetrators punished).

¹²⁴ See Robinson, supra note 57, at 505 (explaining that exceptional circumstances may render a rigid prosecutorial approach harmful to the local community).

¹²⁵ See Rome Statute, supra note 3, art. 53(2)(c); see also Promotion of National Unity and Reconciliation Act 1995, pmbl. (S. Afr.) [hereinafter Reconciliation Act] (providing that one purpose of the amnesty grant is to make recommendations to prevent future offenses against human rights); Roche, supra note 53, at 574 (observing that the success of South Africa’s TRC illustrates that amnesties can provide enduring peace if a truth commission administers them properly). Further, truth commissions ensure that the “parallel truths” of perpetrators are addressed and corrected, helping to understand the cognitive process of the tragedy and to correct misconceptions in public discourse for future generations. Id. at 571.

¹²⁶ See Reconciliation Act, supra note 125, pmbl. (relating the Grant’s intent to “promote rehabilitation and restoration of the human and civil dignity of victims of human rights violations”); see also Goldstein-Bloom, supra note 18, at 364 (stating the TRC collected

testimonies from about 24,000 victims of human rights abuses, thereby creating a social truth as to the circumstances and impact of the abuses); Roche, supra note 53, at 571 (explaining that perpetrators tend to dispose of evidence of their crime, including often burying bodies in mass graves).

¹²⁷ See TRC report, supra note 32, vol. 6, § 1, ch. 5, ¶ 37 (maintaining that “the amnesty process made a meaningful contribution to a better understanding of the causes, nature, and extent of the conflict... [allowing] unique insight into the perspectives and motives of those who committed gross violations of human rights”); see also Roche, supra note 53, at 571 (noting that testimony of offenders was crucial to the success of South Africa’s TRC investigation, helping to identify secret burial sites, conduct exhumations, and provide dignified reburials); Sarkin, supra note 79, at 721 (maintaining that participation in a truth and reconciliation process symbolizes the perpetrator’s willingness to play a role in the new order).

¹²⁸ See Daly, supra note 32, at 106 (remarking that criminal prosecution is unlikely to successfully deter in post-conflict societies because it does not address the causes of the crimes and because trials only address the leaders of the prior regime, without attempting to change the society as a whole to one that does not tolerate such crimes); see also Goldstein-Bloom, supra note 18, at 360 (noting that granting justice-making ability solely to lawyers and administrators may leave victims unsatisfied).

¹²⁹ See Roche, supra note 53, at 575 (proposing that a truth commission “could assist the ICC by passing on any evidence it collected in the course of its own work”).

¹³⁰ See Stafford, supra note 22, at 136 (relating that the Truth and Reconciliation Commission of the Lomé Peace Agreement was critical in providing a restorative forum for victims and perpetrators to complement the Special Court)

¹³¹ See Singer, supra note 8, at 580 (relating that Sierra Leone placed children accused of grave crimes in special closed juvenile hearings and provided counseling and other assistance).

¹³² See Rome Statute, supra note 3, art. 53(2)(c) (ordering the Prosecutor to consider “the age or infirmity of the alleged perpetrator” when deciding if there is a sufficient basis for prosecution); see also UNHCHR Report, supra note 49 (recognizing that since the overwhelming majority of LRA fighters are, or used to be child soldiers, it is unlikely that the Prosecutor would prosecute for crimes they committed while they were under abduction).

¹³³ See Rome Statute, supra note 3, art. 53(2)(c); see also Statute for the Special Court for Sierra Leone art. 7(1), Jan. 16, 2000, U.N. Doc. 5/2002/246, available at <http://www.sc-sl.org/scsl-statute.html> (last visited June 29, 2006) (declaring that the Special Court “shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime”). Further, the Statute instructed the Court to treat alleged perpetrators who were fifteen to eighteen at the time of the crime with dignity to assist in their reintegration in society.

Id.

¹³⁴ See Dugard, supra note 3, at 703 (remarking that allowing sentence mitigation would preserve the integrity of the ICC, which seeks to promote accountability for the commission of international crimes).

¹³⁵ See Rules of Procedure and Evidence for the International Criminal Court, U.N. Doc. ICC-ASP/1/3, Rule 145(2)(a) (2002), available at http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf (last visited March 5, 2006) (listing non-exhaustive mitigating factors including “conduct after the act,” “efforts to compensate the victim” and “cooperation with the Court”).

¹³⁶ See Akhavan, supra note 52, at 418 (proposing that the ICC could offer mitigated sentencing to top LRA members, in the highly unlikely event they are willing to capitulate); see also Stahn, supra note 55, at 718 (proposing that while cooperation with a truth commission would not be a determinative factor in whether to prosecute, it should be a mitigating sentencing factor).

¹³⁷ See Prosecutor v. Erdemovic, Case No. IT-96-22-T, Sentencing Judgment, ¶ 21 (Mar. 5, 1998) (ruling that the defendant's voluntary surrender was a mitigating factor due to the important need to encourage other perpetrators to come forward).

¹³⁸ See Prosecutor v. Rutaganda, Case No. ICTR-96-3, Sentence, ¶ 473 (Dec. 6, 1999) (holding that the defendant's high position, knowledge, and conscious participation in crimes outweighed mitigating factors including his assistance to certain individuals and his poor health); see also Prosecutor v. Kambanda, Case No. ICTR-97-23-T, Judgment and Sentence, ¶ 62 (Sept. 4, 1998) (ruling that the defendant's aggravating circumstances, including his high ministerial post, offsets his cooperation with the Prosecutor and his guilty plea).

¹³⁹ See Arrest Warrant, supra note 14 (describing the charges against the LRA's top leaders, including rape, murder, enslavement, sexual enslavement, forced enlisting of children).

¹⁴⁰ See David Blair, I Killed So Many I Lost Count, Says Boy, 11, Thousands of Children Have Been Taken By a Ugandan Cult and Forced to Join in Mass Murder. Now the Net is Closing on the Fanatic Responsible, **Daily Telegraph**, Aug. 3, 2005, at 12 (observing that although in theory, Uganda's amnesty grant would apply to Kony, an ICC arrest warrant would relinquish the grant, thus deterring Kony from surrendering).

¹⁴¹ See discussion supra Part I.A.3 (setting forth mitigating and aggravating sentencing factors developed by the ICTR and ICTY).

¹⁴² See Uprooted and Forgotten, supra note 4, at 15 (calling for a broader truth-seeking process to supplement ICC investigation, in order to investigate crimes not within ICC jurisdiction); see also Roche, supra note 53, at 579 (proposing a cooperative approach in future cases in which the ICC would prosecute perpetrators who fail to satisfy the conditions of a truth commission amnesty grant).

¹⁴³ See Roche, supra note 53, at 574 (arguing that this approach would thereafter make amnesties more valuable and encourage offenders to seek amnesty).

¹⁴⁴ See Arrest Warrants, supra note 14 (declaring that the Prosecutor’s mandate is to investigate and prosecute those who bear the greatest responsibility for crimes against humanity and war crimes).

¹⁴⁵ See Rome Statute, supra note 3, art. 53(2)(c)(instructing the Prosecutor to consider the “interests of justice” and the “interests of justice” when making prosecutorial decisions); see also Robinson, supra note 57, at 495 (noting that many advocates for prosecuting all offenders of international crimes concede a possible exception where insistence on prosecution would trigger additional hostilities).

¹⁴⁶ See Robinson, supra note 57, at 495 (remarking that granting amnesty to architects of mass atrocities would be especially problematic).

¹⁴⁷ See Uprooted and Forgotten, supra note 4, at 13 (recommending that the Ugandan judicial system prosecute perpetrators of both Ugandan and international law, including crimes committed prior to Uganda’s ratification of the Rome Statute in July 2002); see also Stahn, supra note 55 (suggesting that Article 17 seems to prohibit amnesty grants which exempt certain governmental forces from prosecution).

¹⁴⁸ See Goldstein-Bolocan, supra note 18, at 365-66 (maintaining that although many criticized the TRC for its failure to provide adequate reparation to apartheid victims by letting those responsible for crimes escape with impunity, this underscored the weaknesses of the South African legal system rather than the TRC amnesty program).

¹⁴⁹ See Uprooted and Forgotten, supra note 4, at 11 (recommending that international donors should support, in the form of earmarked funds, the Ugandan Human Rights Commission, a national judicial body that investigates and hears individual cases against the government army that is currently under-funded and understaffed); see also Eric Stover & Marieke Wierda, ...[W]hich Should Prevail, **Int'l Herald Tribune**, Oct. 15, 2005 available at <http://www.iht.com/articles/2005/10/14/opinion/ed/stover.php> (last visited Jan. 20, 2006) (observing that financial and logistical international support would allow Uganda's criminal justice system to try perpetrators for serious crimes not covered by ICC indictments).

¹⁵⁰ See Roche, supra note 53, at 575 (remarking that individual sanction of amnesty from a truth commission is vital to the legitimacy of the amnesty program).

¹⁵¹ See id. at 576 (noting that a state would only be able to argue for an ICC prosecution bar in cases where a truth commission grants amnesties individually based on strict, transparent criteria).

¹⁵² See id. at 575 (commenting that, under a cooperative approach, the ICC would need to be certain that the truth commission adequately fostered truth, reparation, and reconciliation interests).

¹⁵³ See id. (discussing the policy of the Prosecutor for the Special Court of Sierra Leone -- to encourage all parties to go before the truth commission and tell their story without fear of

reprisal but reserving the power to indict the witness through information that the commission did not compel the witness to provide); see also TRC Report, supra note 32, vol. 6, § 1, ch. 1 (declaring that the TRC amnesty applicant was protected against disclosure or her amnesty application in subsequent criminal proceedings and the prosecution was barred from using facts from the application).

¹⁵⁴ See Rome Statute, supra note 20, art. 17(2)(c) (mandating that the ICC, in determining unwillingness of a state to prosecute, shall consider whether the state did not conduct the proceedings “independently or impartially”); see also Stahn, supra note 55, at 713 (noting that “[q]uasi-judicial mechanisms should be . . . sufficiently independent of the state and sufficiently impartial in their decision-making process, in order to be recognized as forums of justice barring proceedings before the Court”).

¹⁵⁵ See Daly, supra note 32, at 389 (explaining that individual amnesty was vital in the Rwandan case due to misconceptions that all perpetrators of genocide were Hutu).

¹⁵⁶ See Roche, supra note 53, at 576 (observing that an unconditional blanket amnesty would be illegal, and would remain susceptible to ICC prosecution); see also Forgotten Voices, supra note 9, at 29 (finding that only four percent of Ugandan polled respondents would support an unconditional amnesty before the community accepts the perpetrator back into the community).

¹⁵⁷ See Forgotten Voices, supra note 9, at 29 (listing survey participants’ proposed requirements in exchange for granting amnesty to perpetrators, including apologizing (56%), confessing wrongdoing (34%), and subjecting themselves to trial (13%)).

¹⁵⁸ See id. at 37 (finding that 52% of Ugandans believe the perpetrator should provide food to victims, and 40% would require food as compensation). Further investigation of appropriate

restitution would be helpful to assist a truth and reconciliation commission determine the fairest price for amnesty according to Ugandans themselves. *Id.* at 6.

¹⁵⁹ *See* Stahn, *supra* note 55, at 712 (observing that Article 17(1)(b)'s inadmissibility requirement that the case must have resulted in a "decision" of a state not to prosecute suggests that the drafters intended a person to be exempt from criminal responsibility only after meeting certain specified criteria).

¹⁶⁰ *See* Statute for the Special Court for Sierra Leone art. 7(1), Jan. 16, 2000, U.N. Doc. 5/2002/246, available at <http://www.sc-sl.org/scsl-statute.html> (last visited June 29, 2006) (prohibiting the Court from trying alleged perpetrators under 15 and requiring discretion for those who were fifteen to eighteen at the time of the alleged crime); *see also* Singer, *supra* note 8, at 580 (stating that the goal of deterrence is diminished where, due to the child's age and duress by threats and drugs, there is less awareness).

¹⁶¹ *See id.* (describing the strategy of the Sierra Leone Special Court in which the Court allowed hearings for children accused of particularly heinous crimes in closed juvenile chambers, and provided psychological counseling and other forms of assistance).

¹⁶² *See* Ssenyonjo, *supra* note 8, at 411-12 (observing that over eighty-five percent of LRA's forces are made up of children).

¹⁶³ *See* Jo Becker, Children as Weapons of War, Human Rights Watch World Report (2004), available at <http://www.hrw.org/wr2k4/>

11.htm (last visited June 29, 2006) (relating that the most active effort at pursuing children recruitment cases was seen in Sierra Leone's Special Court, in which a specialist in child rights issues was appointed to investigate recruitment and abduction crimes).

¹⁶⁴ See id. (arguing for stronger efforts to address impunity because recruiters are seldom held accountable in countries where child soldiers are prevalent).

¹⁶⁵ See Akhavan, supra note 52, at 419 (proposing that if top LRA are willing to surrender, the terms of negotiations could include mitigated sentencing in exchange for voluntary surrender); see also Stahn, supra note 55, at 704 (suggesting that a perpetrator’s voluntarily surrender under an amnesty-peace deal may constitute a mitigating circumstance).

¹⁶⁶ See Prosecutor v. Erdemovic, Case No. IT-96-22-T, Sentencing Judgment, ¶ 21 (Mar. 5, 1998) (holding that based on the ICTY’s “duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia,” “appropriate” weight must be given for an accused’s voluntary surrender).

¹⁶⁷ See Akhavan, supra note 52, at 418 (observing that in northern Uganda, many LRA members and civilians believe that the ICC will arrive to punish abducted children); see also Uprooted and Forgotten, supra note 4, at 3 (advocating that the ICC must attempt to inform the Ugandan civil population of the scope of its investigation, such as the fact that only crimes committed after July 2002 fall within its jurisdiction).

¹⁶⁸ See Blair, supra note 164 (quoting an Acholi chief who reported that because only those at the top of the LRA have access to media, when leaders hear reports of possible ICC intervention, they advise subordinates that if they surrender, “the ICC will get you”).

¹⁶⁹ See Rome Statute, supra note 3, pmb. (declaring that “it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes”).

¹⁷⁰ See Stahn, supra note 55, at 719 (concluding that the framework of the ICC compels the Prosecutor and the Court to perform case-by case evaluation and judgment).

¹⁷¹ See Clark, supra note 17, at 404 (noting the belief that accepting amnesties would not immunize putative offenders from prosecution creates a disincentive to surrender).

¹⁷² See Roche, supra note 53, at 579 (observing that ICC support would enable truth commissions to carry a more legitimate threat of prosecution while truth commissions could enhance the Court's own legitimacy by demonstrating its support of national efforts in addressing human rights injustices).

¹⁷³ See Newman, supra note 10, at 342 (commenting that much is at stake in Uganda because the early decisions of the ICC Prosecutor will likely set a precedent, thereby ultimately shaping the Rome Statute's application in future cases).