

COMPLEMENTARITY IN THE SITUATION OF UGANDA

Is Uganda Unwilling to Genuinely Prosecute the Leaders of the LRA?

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“The local culture of Uganda, wanting peace above all else, is at odds with the Western world, wanting justice as it is known in Western jurisprudence.”

- K. Hanlon*

* K. Hanlon, 'Peace or Justice: Now that Peace is Being Negotiated in Uganda, Will the ICC Still Pursue Justice?', *Tulsa Journal of Comparative and International Law* 2007 (14)(2), pp. 295-337, p. 298.

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1. INTRODUCTION

The rebel Lord's Resistance Army (LRA) killed at least 321 civilians and abducted 250 others, including at least 80 children, during a previously unreported four-day rampage in the Makombo area of northeastern Democratic Republic of Congo in December 2009, Human Rights Watch said in a report released [March 28, 2010].¹

This recent brutal four-day attack by the Lord's Resistance Army ('LRA'), originally operating only in northern Uganda, "[...] demonstrates that the LRA remains a serious threat to civilians and is not a spend force, as the Ugandan and Congolese governments claim," stated Anneke Van Woudenberg, senior Africa researcher at Human Rights Watch.² During this attack from 14 to 17 December 2009, at least ten villages were attacked by the rebel movement, which is notorious for its particularly vicious practices.

The vast majority of those killed were adult men, whom LRA combatants first tied up and then hacked to death with machetes or crushed their skulls with axes and heavy wooden sticks. The dead include at least 13 women and 23 children, the youngest a 3-year-old girl who was burned to death.³

Since the beginning of the conflict in 1987, tens of thousands of people have been abducted, thousands of others have been killed or maimed and up to 1,8 million persons have become internally displaced.⁴ While at first contained to northern Uganda, the LRA now also operates from border areas in southern Sudan, the

¹ Human Rights Watch, News Release, 'DR Congo: Lord's Resistance Army Rampage Kills 321', 28 March 2010, available at <<http://www.hrw.org/en/news/2010/03/28/dr-congo-lord-s-resistance-army-rampage-kills-321>>; the report, titled 'Trail of Death: LRA Atrocities in Northeastern Congo', is based on a Human Rights Watch fact-finding mission in February 2010 and is available for download at <<http://www.hrw.org/en/reports/2010/03/29/trail-death-0>>.

² Human Rights Watch, News Release, 'DR Congo: Lord's Resistance Army Rampage Kills 321', 28 March 2010, available at <<http://www.hrw.org/en/news/2010/03/28/dr-congo-lord-s-resistance-army-rampage-kills-321>>.

³ *Ibid.*

⁴ See for example S. Worden, 'The Justice Dilemma in Uganda', United States Institute for Peace (USIP), February 2008, p. 2, available for download at <<http://www.usip.org/resources/justice-dilemma-uganda>>.

Democratic Republic of Congo ('DRC') and the Central African Republic. Since the LRA fighters are so scattered, it is difficult to estimate the movement's current numerical strength and to pin down the exact whereabouts of its leader, Joseph Kony. In March 2010 it was reported that Kony had taken refuge in the southern Darfur region of Sudan in hopes of receiving support from the Khartoum government, a former benefactor. However, it appears that he has now moved back to the Central African Republic, where most of his forces are stationed.⁵

After the Government of Uganda continuously failed to defeat the rebel movement, President Museveni referred the situation concerning the LRA to the International Criminal Court ('ICC' or 'Court') in December 2003.⁶ The Court started its investigation in Northern Uganda in June 2004.⁷ The ICC is based on the principle of complementarity, which means that it is complementary to national jurisdictions. Therefore, the Court can only investigate situations if the states are unwilling or unable to investigate them themselves. In July 2005, Uganda's self-referral had led to the issuance of five arrest warrants for LRA leaders. In reaction, the LRA leadership expressed their wish to enter into peace negotiations with the Government of Uganda. As a stake in the negotiations, the rebel leaders demanded that the warrants of arrest against them be dropped. The Government of Uganda, however, will not request the ICC to withdraw the warrants until a final peace agreement has been signed.⁸ In a 2007 agreement between the Ugandan Government and the LRA, the government had agreed to prosecute the indicted rebels nationally. A special division of the High Court of Uganda has even been established to prepare for the national

⁵ International Crisis Group, 'LRA: A regional strategy beyond killing Kony', Africa Report N°157, 28 April 2010, p. i, available for download at <<http://www.crisisgroup.org/en/regions/africa/horn-of-africa/uganda.aspx>>.

⁶ ICC Press Release, 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC' (ICC-20040129-44).

⁷ ICC Press Release, 'Prosecutor of the International Criminal Court opens an investigation into Northern Uganda' (ICC-OTP-20040729-65).

⁸ In July 2006, while the peace talks were being conducted between the Government of Uganda and the LRA, the Chief Prosecutor of the ICC stated that "[t]he Government of Uganda did not ask for any withdrawal of the warrants of arrest. The arrest warrants remain in effect.", ICC Press Release, 'Statement by the Chief Prosecutor Luis Moreno-Ocampo' (ICC-OTP-20060712-149). This could indicate that a request for withdrawal may be taken under advisement. However, it should be noted that neither the Rome Statute nor the Rules of Procedure and Evidence of the ICC mention the possibility of making such a request. According to Article 58(4) of the Rome Statute, "[t]he warrant of arrest shall remain in effect until otherwise ordered by the Court."

prosecution of international crimes. Is Uganda therefore now willing and able “[...] genuinely to carry out the investigation or prosecution” as required by Article 17(1)(a) of the Rome Statute? If so, the ICC may have to reconsider the admissibility of the case under Article 17 of the Statute. However, although the 2007 agreement indicates that persons who are particularly responsible for international crimes committed during the conflict in northern Uganda will be dealt with by formal courts through formal procedures⁹, it also creates the possibility of alternative penalties to these persons.¹⁰ Could this reflect unwillingness on the part of Uganda to genuinely carry out the prosecutions of the LRA leaders? Could Uganda only want to undertake national proceedings for the purpose of shielding the persons concerned from criminal responsibility for international crimes in the sense of Article 17(2)(a) of the Rome Statute? Could inadequate sentencing be indicative of such shielding? Also, does Uganda have the ability to prosecute these serious offences, since in more than twenty years it has not been able to arrest the perpetrators and its judicial system has never before dealt with the prosecution of international crimes. Furthermore, after having referred the situation to the Court itself, does Uganda still have the right to challenge the admissibility of the case under Article 19 of the Rome Statute? These questions will be addressed in this thesis. The overarching research question reads as follows: *Is Uganda unwilling genuinely to prosecute the leaders of the LRA?* Or in other words, is the case against the LRA leaders admissible before the ICC under Article 17(1)(a) of the Rome Statute? To answer this question, we will first delve into the broader concept of complementarity (paragraph 2), before analysing Articles 17 and 17(2)(a) in particular (paragraphs 2.3.1. and 2.3.2.). To be able to answer our research question, it would be useful to have a brief look at the conflict in northern Uganda, the LRA, Uganda’s self-referral, and the peace agreement between the Ugandan Government and the LRA (paragraph 3). To answer the question whether Uganda is unwilling genuinely to prosecute the leaders of the LRA, we will

⁹ Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement, 29 June 2007, (‘2007 Agreement’), Art. 4.1 & 6.1.

¹⁰ 2007 Agreement, Art. 6.3 & 6.4.

apply our knowledge about the concept of complementarity in general (paragraph 4.1.), and that of shielding in particular (paragraph 4.1.1.), to the situation of Uganda. After concluding that Uganda might be willing genuinely to prosecute the LRA leaders, we will examine the options by which national prosecutions could be arranged (paragraph 4.2.). However, national prosecutions may reveal shielding of the persons in question by the Ugandan Government after all, in which case the ICC may want to regain control over the case so that justice can still be served. Therefore, we will also analyse the possibilities by which the ICC can accomplish this (paragraph 4.3.). Finally, from the analysis of all this information follows a conclusion about the situation of Uganda and the predicament its government is in.

2. COMPLEMENTARITY

“‘Complementarity’ is no more than a term that describes the relationship between national and international jurisdictions.”¹¹ As for the ICC’s relationship with national jurisdictions, the Rome Statute declares that the Court “[...] shall be complementary to national criminal jurisdictions.”¹² Complementarity is said to be the cornerstone of the entire Rome Statute.¹³ Arsanjani explains how the principle of complementarity is the first of three principles which underlie the statute, the second being the principle “[...] that the statute is designed to deal only with the most serious crimes of concern to the international community as a whole”, and “[t]he third principle was that the statute should, to the extent possible, remain within the realm of customary international law.”¹⁴ According to the principle of complementarity, the ICC may only assume jurisdiction when national criminal justice systems that have jurisdiction are not willing or able genuinely to investigate or prosecute. Thus, “[u]nlike the *ad hoc* Tribunals for the former Yugoslavia, Rwanda, Sierra Leone and Lebanon, the ICC does not have primacy over national courts”¹⁵, instead it is complementary to them. According to Cassese, there exist two underlying reasons for the approach taken by the ICC. First, states considered it to be unpractical and inappropriate if the Court were to be flooded with cases from around the world, considering its limited resources and infrastructure. Secondly, states intended to respect the principle of state sovereignty as much as they could.¹⁶ Therefore, according to Stigen, one of the purposes of the complementarity principle is the safeguarding of state sovereignty. Other purposes of the principle are the

¹¹ El Zeidy 2008, p. 132.

¹² Rome Statute of the International Criminal Court (‘Rome Statute’), Preamble Par. 10 & Art. 1.

¹³ See for example Akhavan 2005, p. 413; Arsanjani 1999(1), p. 67; Swart & Sluiter 1999, p. 105; *Prosecutor v. Kony, Otti, Odhiambo, Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute (ICC-02/04-01/05), Pre-Trial Chamber II, 10 March 2009, p. 18, par. 34.

¹⁴ Arsanjani 1999(2), p. 25.

¹⁵ Williams & Schabas 2008, p. 625.

¹⁶ Cassese 2003, p. 351.

enhancement of national investigations and prosecutions, the insurance of effective ICC interference, and the insurance of an appropriate selection of cases.¹⁷

Article 17 of the Rome Statute is considered to be the main article on complementarity.¹⁸ As Akhavan explains, the object and purpose of this article is to effectuate the principle that the Court's exercise of jurisdiction is complementary to that of national courts. "Thus, Article 17 limits the ICC's jurisdiction in favour of national judicial systems, [...]"¹⁹ According to Miskowiak, Article 17 creates "[...] a delicate balance between the right and responsibility of states to investigate and prosecute, but that permits the Court to assume jurisdiction in special cases to ensure that justice is served."²⁰ Closely related to Article 17 are Articles 18 and 19. Article 18 deals with 'Preliminary rulings regarding admissibility' and, as stated by Arsanjani, was designed to reinforce the principle of complementarity.²¹ According to this article the ICC Prosecutor has to inform all parties to the Rome Statute, as well as non-parties, which would normally exercise jurisdiction over the case concerned, when a situation has been referred to the ICC by a state or when the Prosecutor is exercising its *proprio motu* powers.²² Therefore, "[c]omplementarity applies not only with regard to the States parties to the ICC Statute but also with respect to States not parties (see Article 18(1))."²³ Article 19, titled 'Challenges to the jurisdiction of the Court or the admissibility of a case', stipulates in its first paragraph that "[t]he Court may, on its own motion, determine the admissibility of a case in accordance with article 17." This competence of the ICC to decide whether national proceedings are genuine is said to be crucial in combating the shielding of persons from criminal responsibility for international crimes.²⁴

¹⁷ Stigen 2008, pp. 15-19.

¹⁸ See for example Arsanjani 1999(2), p. 27; Kaul 2001, pp. 59-60; Keller 2008, p. 252; Miskowiak 2000, p. 47.

¹⁹ Akhavan 2005, p. 413.

²⁰ Miskowiak 2000, p. 50.

²¹ Arsanjani 1999(1), p. 70.

²² *Ibid.*

²³ Cassese 2003, p. 352.

²⁴ Miskowiak 2000, p. 50.

According to Akhavan, there are two competing interpretations of the principle of complementarity under the Rome Statute. A negative interpretation of complementarity maintains “[...] that Article 17 categorically limits ICC jurisdiction to those situations in which a state is unwilling or unable to exercise jurisdiction.”²⁵ Under this interpretation, the ICC is meant to be a substitute for national trials only in those situations where the domestic judicial system in question fails to prosecute. This rule would even apply in cases of self-referral. “Consequently, a state referral that does not meet the criteria of unwillingness or inability specified in Article 17(2)-(3) would be declared inadmissible.”²⁶ A positive interpretation of complementarity, on the other hand, maintains “[...] that Article 17 limits ICC jurisdiction through the criterion of unwillingness or inability only when there is a conflict between the ICC and a national criminal jurisdiction.”²⁷ Such a conflict exists when both the Court and a state intend to prosecute, in which case the Court can only exercise its jurisdiction if it is determined that the state in question is unwilling or unable to prosecute genuinely. “But when there is no conflict of jurisdiction because a state has voluntarily relinquished jurisdiction to the ICC, the criteria set forth in Article 17(2)-(3) would not apply.”²⁸

In Burke-White’s opinion, however, the Court’s present approach could best be termed ‘passive complementarity’, since the Court steps in to carry out its own prosecutions only when national jurisdictions fail to act.²⁹ Instead, he would prefer a proactive approach whereby the Court should encourage, and perhaps even assist, national governments to undertake their own prosecutions of international crimes. Under such a policy of ‘proactive complementarity’, the ICC encourages states by cooperating with them and using political leverage.³⁰ Although the drafters of the Rome Statute did not have this understanding of the principle of complementarity,

²⁵ Akhavan 2005, p. 413.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Burke-White 2008, p. 54, n. 4 & p. 56.

³⁰ *Ibid.*, p. 54 & 56.

according to Burke-White, it is in line with the spirit of the Statute since it affirms the duty of national criminal jurisdictions to prosecute international crimes.³¹ The Office of the Prosecutor itself claims that its Prosecutorial Strategy is based on ‘a positive approach to complementarity’, which means that it will encourage genuine national proceedings as much as possible since, according to the Rome Statute, states have the primary responsibility to prevent and prosecute international crimes committed on their own territories.³²

It can be concluded that different interpretations of the principle of complementarity are in existence, as well as different opinions as to how it should be applied in practice. Therefore, it would perhaps be interesting to examine how the complementary nature of the ICC has developed itself, as well as how other international tribunals have arranged their relationship to national courts in the past.

2.1. THE DEVELOPMENT OF THE PRINCIPLE OF COMPLEMENTARITY

According to El Zeidy, “[t]he London International Assembly was the first to propose a clear complementarity relationship between domestic courts and a future international criminal court.”³³ The London International Assembly was a non-official body assembled in 1941 to recommend appropriate solutions for the effective punishment for those who had committed war crimes during the course of World War II. The establishment of an international criminal court was considered. However, since there were too many cases to be adjudicated by such an international court, national courts (with the exception of German courts) should remain active in prosecuting war criminals whenever they had jurisdiction, while leaving the prosecution of the ‘most serious crimes’ to the international criminal court. Certain requirements, for which the terms ‘impossibility’ and ‘inconvenience’ were used, needed to be fulfilled before the international court could take over proceedings from

³¹ See Rome Statute, Preamble Par. 6: “Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”

³² Prosecutorial Strategy 2009-2012, The Office of the Prosecutor, 1 February 2010, pp. 2, 4 & 5.

³³ El Zeidy 2008, p. 59.

a national court.³⁴ The discussion of the London International Assembly resulted in a 'draft convention for the creation of an international criminal court' in November 1943. This draft convention provided national courts with primacy jurisdiction, while the international criminal court remained for exceptional situations.³⁵ This system of complementarity envisaged by the London International Assembly appears to be remarkably similar to that embodied in the Rome Statute today.

The 1945 London Agreement, establishing the Nuremberg International Military Tribunal after World War II, stipulated in Article 6 that

[n]othing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals.

According to Kleffner, "[t]his provision suggests that the various courts and tribunals were to exercise jurisdiction *concurrently* with the IMT."³⁶ In practice, he concludes, this meant that 24 major perpetrators were indicted by the tribunal, whereas national courts adjudicated the rest of the cases.³⁷ This was consistent with the purpose of the Nuremberg Tribunal, which was established to prosecute only the major war criminals.³⁸ El Zeidy therefore argues that "[...], the International Military Tribunal reflected the principle of primacy, or the supremacy of international law over national law, with regard to trying major war criminals for core crimes."³⁹ According to him, there was no direct relationship between the Nuremberg Tribunal and national courts, since they did not have the same jurisdictions and prosecuted different categories of war criminals, which is why another form of the

³⁴ *Ibid.*, pp. 59-61.

³⁵ *Ibid.*, pp. 59-63.

³⁶ Kleffner 2008, p. 62.

³⁷ *Ibid.*, p. 64.

³⁸ El Zeidy 2008, p. 74.

³⁹ *Ibid.*, p. 75.

complementarity principle emerged than was previously envisaged by the London International Assembly.⁴⁰

Many years later, two *ad hoc* tribunals were established through resolutions of the United Nations Security Council: The International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'). According to Stigen, "[t]he ICTY and ICTR statutes were the first international instruments to expressly regulate the relationship between international and national criminal jurisdiction."⁴¹ The statutes stipulate that the international tribunals "[...] and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law [...]"⁴² and that the tribunals shall have primacy over national courts.⁴³ Therefore, although national courts may exercise concurrent jurisdiction, under this complementarity regime the tribunals may "[a]t any stage of the procedure, [...] formally request national courts to defer to the competence of the International Tribunal [...]"⁴⁴ If a person has already been prosecuted for serious violations of international humanitarian law by a national court, the tribunals may only prosecute him or her again when the violation was characterised as an ordinary crime, when the national proceedings were not impartial or independent, when the proceedings were intended to shield the person concerned from international criminal responsibility, or when the case had not been diligently prosecuted.⁴⁵ The admissibility regime of the *ad hoc* tribunals, where "[t]he jurisdiction is concurrent with primacy for the Tribunals, provided certain criteria are met"⁴⁶, is described as 'modified primacy' by Stigen. According to him, such a regime provides a very effective international jurisdiction, since "[t]he admissibility grounds do not only aim at avoiding impunity; they even allow the transfer of cases where

⁴⁰ *Ibid.*, pp. 74-76.

⁴¹ Stigen 2008, p. 41.

⁴² ICTY Statute, Art. 9(1); ICTR Statute, Art. 8(1).

⁴³ ICTY Statute, Art. 9(2); ICTR Statute, Art. 8(2).

⁴⁴ ICTY Statute, Art. 9(2); *see also* ICTR Statute, Art. 8(2).

⁴⁵ ICTY Statute, Art. 10(2); ICTR Statute, Art. 9(2).

⁴⁶ Stigen 2008, p. 41.

this would be beneficial because of the factual or legal issues involved.”⁴⁷ Stigen, however, also points to ‘one important principled argument against international primacy’: International primacy can divert focus from the national to the international level, which can wrongfully suggest that the prosecution of international crimes is seen as primarily an international task.⁴⁸

The ‘modified primacy’ regime chosen for the *ad hoc* tribunals is significantly different than the complementarity regime of the ICC, which endows the Court with complementary jurisdiction as opposed to primacy over national courts. The two regimes are, however, both based on concurrent jurisdiction. As El Zeidy explains it, the regime established by the *ad hoc* tribunals “[...] is based on *vertical* concurrent jurisdiction strengthened by primacy, [...]” whereas the Court’s regime “[...] is based on the inverse *vertical* concurrent jurisdiction that provides national courts *vis-à-vis* the ICC with primacy to investigate situations, prosecute and try cases, known as complementarity.”⁴⁹ The Rome Statute of the ICC, in which the principle of complementarity was given a prominent place, was adopted with 120 favourable votes, 21 abstentions and only 7 negative votes. This was only possible after elaborate discussions between governments as well as between international law experts.⁵⁰ According to Kleffner, it was the 1994 Draft Statute, drafted by the International Law Commission⁵¹, that contained “[...] the first express reference to the concept of *complementarity*.”⁵² The negotiations led to an agreement on this general concept relatively expediently, however, it turned out to be much more difficult to find consensus on the details of the complementarity regime.⁵³ Eventually, Article 35 of

⁴⁷ *Ibid.*, p. 42.

⁴⁸ *Ibid.*, p. 43.

⁴⁹ El Zeidy 2008, p. 139.

⁵⁰ Stigen 2008, p. 31.

⁵¹ In 1989 the International Law Commission was requested by the United Nations General Assembly to address the establishment of an international criminal court, and “[i]n 1993 the Assembly asked the Commission to elaborate a draft statute for such a court as a matter of priority. The Commission completed its draft in 1994.”, Arsanjani 1999(2), p. 22.

⁵² Kleffner 2008, p. 73.

⁵³ *Ibid.*, p. 96.

the 1994 Draft Statute, titled 'Issues of admissibility', gave form to the concept of complementarity.⁵⁴ According to this article the Court may decide

that a case before it is inadmissible on the ground that the crime in question:

(a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;

(b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or

(c) is not of such gravity to justify further action by the Court.

Alongside this article, Article 42 of the draft statute, which dealt with the principle of *ne bis in idem*, further determined the Court's relationship to national jurisdictions. If a person had already been prosecuted by another (national) court, this article stipulated that the ICC could prosecute him or her again if the previous prosecution was for an ordinary crime or when it was a sham trial. However, the International Law Commission stressed the exceptional character of allowing someone to be prosecuted for a second time in case of previous sham proceedings, noting that 'mere lapses or errors on the part of the earlier prosecution' were not enough to allow for a subsequent trial.⁵⁵ As stated by El Zeidy,

[t]he concept of complementarity as it exists today finally crystallized with the adoption of an *Ad hoc* Committee on the Establishment of an International Criminal Court (*Ad hoc* Committee) to study and develop the 1994 International Law Commission's draft statute.⁵⁶

⁵⁴ *Ibid.*, p. 74.

⁵⁵ *Ibid.*, p. 75.

⁵⁶ El Zeidy 2008, p. 126.

In 1995, this Ad Hoc Committee described the principle of complementarity as “[...] an essential element in the establishment of an international criminal court”⁵⁷, but the relevant provisions in the 1994 Draft Statute were viewed as insufficient.⁵⁸ Opposing opinions were held when it was discussed in whose favour the presumption of complementarity should be established. Several delegations preferred to endow national criminal jurisdictions with primacy, while others favoured an international court with primacy over its national counterparts.⁵⁹ It was stated that a balanced approach to the principle of complementarity would be necessary. It was considered important to preserve the primacy of national jurisdictions, however, the jurisdiction of the international court was not meant to be merely residual to those national jurisdictions.⁶⁰ Another subject discussed by the Ad Hoc Committee was how far the jurisdiction of the international court should reach in relation to national jurisdictions. The 1994 Draft Statute proposed that the ICC could only avail itself of cases where national proceedings were ‘unavailable’ or ‘ineffective’.⁶¹ According to many delegations, these terms were unclear and “[q]uestions were raised as to the standards for determining whether a particular national judicial system was ‘ineffective’.”⁶² The Ad Hoc Committee observed

[...] that the International Law Commission only expected the international criminal court to operate in cases in which there was no prospect that alleged perpetrators of serious crimes would be duly tried in national courts.⁶³

The committee furthermore stressed that the International Law Commission had not intended “[...] to establish a hierarchy between the international criminal court and

⁵⁷ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, General Assembly Official Records, 50th Session, Supplement No. 22, UN Doc. A/50/22, (‘Ad Hoc Committee Report’), p. 6, par. 29.

⁵⁸ Kleffner 2008, p. 76.

⁵⁹ Ad Hoc Committee Report, pp. 6-7, par. 31-32; Kleffner 2008, p. 76.

⁶⁰ Ad Hoc Committee Report, p. 7, par. 33; El Zeidy 2008, p. 127.

⁶¹ El Zeidy 2008, pp. 127-128.

⁶² Ad Hoc Committee Report, p. 8, par. 41.

⁶³ *Ibid.*, p. 8, par. 42.

national courts, or to allow the international criminal court to pass judgment on the operation of national courts in general.”⁶⁴ In 1996, the discussion on complementarity was continued by the Preparatory Committee, which by that time had replaced the Ad Hoc Committee. The Preparatory Committee referred to the exceptional character of the Court’s jurisdiction⁶⁵ and observed that under international law the exercise of police power and penal law is the prerogative of states, therefore “[...] the jurisdiction of the Court should be viewed only as an exception to such State prerogative.”⁶⁶ The terms ‘unavailable’ and ‘ineffective’ were also discussed again. It was suggested that these words should be defined further, while it was also proposed to dispose of them altogether.⁶⁷ Also, “[i]t was noted that while the determination of ‘availability’ of national criminal systems was more factual, the determination of whether such a system was ‘ineffective’ was too subjective.”⁶⁸ It was therefore felt that more stringent and objective criteria were needed in order to obtain greater clarity and security.⁶⁹ Mr. John Holmes, who was asked to coordinate informal consultations on this issue, produced a draft provision on complementarity in 1997, which was approved by the Preparatory Committee. The terms ‘unwilling’ and ‘unable’ were now used in the article on admissibility and several conditions for determining a state’s ‘unwillingness’ or ‘inability’ were provided for as well.⁷⁰ The Preparatory Committee finally produced a draft statute in 1998, in which Article 15 dealt with the issues of admissibility.⁷¹ As stated by Stigen, “[t]he Preparatory Committee made important progress on the definition of the admissibility criteria.”⁷² When the Rome Conference started in June 1998, many delegations supported the

⁶⁴ *Ibid.*, p. 9, par. 43.

⁶⁵ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, (Proceedings of the Preparatory Committee during March-April and August 1996), General Assembly Official Records, 51st Session, Supplement No. 22, UN Doc. A/51/22, (‘Preparatory Committee Report Vol. I’), p. 36, par. 154.

⁶⁶ Preparatory Committee Report Vol. I, p. 36, par. 155.

⁶⁷ *Ibid.*, pp. 37-38, par. 161.

⁶⁸ *Ibid.*.

⁶⁹ *Ibid.*, p. 39, par. 166.

⁷⁰ El Zeidy 2008, pp. 129-130.

⁷¹ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, pp. 40-42.

⁷² Stigen 2008, p. 80.

scheme of 'unwillingness' and 'inability' as reflected by the latest draft statute. However, there were still some concerns with regard to the interpretation of the principle of complementarity, the biggest of which was that Draft Article 15(2) lacked objective criteria for the determination of a state's 'unwillingness'. Some delegates felt that the criteria for this determination were too subjective and endowed the Court with unduly high powers.⁷³ However, "[t]he negotiations finally succeeded in accommodating these concerns, and the final solutions are reflected in the current text of Article 17 of the Rome Statute."⁷⁴

Article 17 of the Rome Statute provides the Court with the criteria by which it can determine whether a case before it is admissible or not. Preceding articles in the statute determine how a case can be brought before the Court in the first place. Articles 13(a) and 14 stipulate that a situation can be referred to the Court by a state party. According to Article 13(b), the Security Council is also able to refer a situation. As a third option, Articles 13(c) and 15 endow the ICC Prosecutor with the power to initiate investigations *proprio motu*. The first three situations, which includes that of Uganda, were brought before the Court by means of a so-called 'self-referral'. Since the Rome Statute, however, does not expressly mention this type of referral, it would seem appropriate to briefly elaborate on this concept.

2.2. SELF-REFERRAL

A self-referral⁷⁵ is a referral made under Articles 13(a) and 14 of the Rome Statute by the territorial state. Thus, a state on whose territory international crimes have been or are being committed, allegedly by its own citizens, refers its own situation to the Court. This method of triggering the jurisdiction of the ICC was barely considered during the negotiations. In its report, the Ad Hoc Committee mentioned that it was "[...] suggested that the draft statute should provide for the

⁷³ El Zeidy 2008, p. 132; *see also* Stigen 2008, pp. 81-82.

⁷⁴ El Zeidy 2008, p. 132.

⁷⁵ Also referred to as 'auto-referral' or 'self-complaint'. On the concept of self-referrals in general, *see for example* El Zeidy 2008, pp. 211-222; Gaeta 2004; Kleffner 2008, pp. 213-223; Kress 2004; Stigen 2008, pp. 246-247.

possibility that a State might voluntarily decide to relinquish its jurisdiction in favour of the international criminal court [...].”⁷⁶ However, the Rome Statute does not explicitly provide for this possibility. On the other hand, it does not seem to prohibit self-referrals either, in fact, “[o]n the face of it, Article 14 [of the ICC Statute] appears to authorize States Parties to refer situations to the Court without any restriction.”⁷⁷ Articles 13(a) and 14 merely provide that ‘a state party’ may refer a situation to the Prosecutor of the ICC, they do not stipulate that this can only be states parties not directly involved in the situation.⁷⁸ Also, there seems to be a consensus among legal scholars that self-referrals are consistent with the spirit of the Rome Statute. El Zeidy, for instance, refers to the well-established principle of *aut dedere aut judicare*, which gives states the choice to either prosecute or extradite an alleged perpetrator, and argues that “[i]n the case of the ICC, the choice would be that the State prosecute, extradite to another State that is willing to prosecute or surrender to the Court.”⁷⁹ According to him, this renders a self-referral “[...] compatible with the spirit of the Statute.”⁸⁰ El Zeidy then refers to Kress who has reached a similar conclusion. Kress discusses the compatibility of a self-referral with “[...] the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”⁸¹ He wonders how the duty of the territorial state to exercise criminal jurisdiction nationally “[...] can be reconciled with the triggering of an *international* investigation under Article 14 by the same state.”⁸² According to him, the words ‘exercise its criminal jurisdiction’ should not be interpreted too strictly so as to mean investigate, prosecute and punish nationally. Instead, the territorial state should be given another option, namely to refer its situation to the Court in order to have it investigated internationally, so as to help reach the Statute’s aim of ending impunity.⁸³ According

⁷⁶ Ad Hoc Committee Report, p. 9, par. 47.

⁷⁷ Kress 2004, p. 945.

⁷⁸ El Zeidy 2008, p. 217; Kleffner 2008, p. 214; Kress 2004, p. 945.

⁷⁹ El Zeidy 2008, p. 221.

⁸⁰ *Ibid.*

⁸¹ Rome Statute, Preamble Par. 6.

⁸² Kress 2004, p. 945.

⁸³ *Ibid.*, pp. 945-946.

to Kress, the practice of self-referrals is “[...] generally speaking, firmly grounded in law and commendable as a matter of legal policy.”⁸⁴ Akhavan is also of the opinion that “[...] there is no basis, in law or policy, for the assertion that states cannot voluntarily relinquish jurisdiction in favor of the ICC.”⁸⁵ Kleffner agrees that the relevant provisions of the Rome Statute do not exclude a self-referral by a state party. He does, however, appear to be somewhat critical of self-referring states by stating that “[i]nstead of demonstrating that they are willing and able to investigate and prosecute core crimes, they seek to justify their auto-referral by claiming their inability, [...]”⁸⁶ Although Kleffner prefers to see an express discouragement of self-referrals, he promotes any express regulation of them to, for instance, clarify under what conditions they are permissible.⁸⁷ Furthermore, the concept of self-referrals seems to be endorsed by the ICC itself. Pre-Trial Chamber I of the Court believed the DRC was unable to carry out the investigation and prosecution of ICC crimes and therefore,

[i]n the Chamber’s view, this is why the self-referral of the DRC appears consistent with the ultimate purpose of the complementarity regime, according to which the Court by no means replaces national criminal jurisdictions, but it is complementary to them.⁸⁸

Thus, the Rome Statute does not seem to prevent states from referring their own situation to the Court, and legal scholars, as well as the Court itself, agree that self-referrals are in line with the spirit of the Statute. The practical benefit of self-referrals would appear to be that the Prosecutor is assured that the self-referring state has the political will to provide the necessary cooperation and assistance.⁸⁹ Be that as it may, such cooperation is unlikely to continue when the Prosecutor starts to

⁸⁴ *Ibid.*, p. 945.

⁸⁵ Akhavan 2005, p. 415.

⁸⁶ Kleffner 2008, pp. 213-214.

⁸⁷ *Ibid.*, pp. 222-223.

⁸⁸ *Situation in the Democratic Republic of Congo*, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58 (ICC-01/04-01/07), Pre-Trial Chamber I, 10 February 2006, p. 16, par. 36.

⁸⁹ Gaeta 2004, p. 950; Kress 2004, p. 948.

investigate state agents instead of only parties opposing the state. According to Gaeta, this is one of two possible dangers of self-referrals, the other being the situation where a state's request for the Court to investigate is only motivated by the wish to internationally expose the crimes allegedly being committed by the other party to an internal conflict.⁹⁰ There could thus be the temptation of territorial states to file, what Kress calls a 'selective or asymmetrical self-referral'.⁹¹ Such one-sided self-referrals could perhaps lead to one-sided investigations by the Court, so as to appease the referring state and not to lose its cooperation. Another risk of self-referrals could be that states will overburden the Court with cases they are capable to deal with themselves.⁹² However, El Zeidy argues that if the ICC were to reject self-referrals as a matter of principle, certain situations may not be dealt with which would lead to a denial of justice. According to him, self-referrals should therefore be considered on a case-by-case basis⁹³, which appears to be a solid piece of advice.

Since the possibility of self-referrals was not specifically considered by the drafters, the Rome Statute does not expressly refer to it. Therefore, some questions remained unanswered, especially in relation to admissibility. For us, the most relevant question would be whether the self-referring state has waived its right to challenge the admissibility. If so, Uganda would no longer have the ability to challenge the admissibility of the case against Kony and the others before the ICC.

2.2.1. SELF-REFERRAL AND ADMISSIBILITY

Different positions could be held when it comes to the question whether a self-referring state has retained or waived its right to challenge the admissibility of a case before the ICC. Stigen, for instance, explains how international law in general recognises states' right to, expressly or implicitly, waive their rights. Although the Rome Statute does not expressly allow such a waiver, it does not expressly prohibit it

⁹⁰ Gaeta 2004, pp. 951-952.

⁹¹ Kress 2004, p. 946.

⁹² Cryer, Friman, Robinson & Wilmschurst 2008, p. 135.

⁹³ El Zeidy 2008, p. 222.

either. Therefore, Stigen argues, the general rule applies whereby states may waive their right to challenge the admissibility, either expressly or implicitly. A self-referring state could expressly waive this right in its referral, but it might also be argued that a self-referral in itself implies a waiver of the state's right to challenge the admissibility, Stigen says.⁹⁴ According to him, however, "[v]iewing a self-referral as an automatic waiver would be inconsistent with the purpose of the Rome Statute [...]"⁹⁵, and therefore he submits that self-referring states retain their right to challenge the admissibility of any case within the situation they have referred to the Court.⁹⁶ Kleffner appears to hold to same position. He argues that, since it was the self-referring state's intention to have the ICC, rather than itself, carry out the investigation and prosecution with regards to the referred situation, it is highly unlikely this state would be inclined to subsequently challenge the admissibility. However, he feels this possibility cannot be completely excluded, for instance in cases where the situation has changed subsequent to the self-referral.⁹⁷ Accordingly, Kleffner does not seem to reject the right of a self-referring state to challenge the admissibility. He also points, in a slightly different context, to the fact that states can only refer situations to the Court, not specific cases.⁹⁸ Given this fact, one could argue that after having referred a general situation to the ICC, the self-referring state should still be allowed to challenge the admissibility of a specific case within that situation, for instance because it has the person in question in custody and started proceedings against him or her already.

El Zeidy, on the other hand, seems to have a different opinion. He discusses the difference between a self-referral and a waiver of complementarity: "A self-referral explains a factual situation where a State Party directly linked to the crimes refers its own situation to the Court", whereas a waiver of complementarity describes the factual situation in which "[...] a State refrains from initiating domestic

⁹⁴ Stigen 2008, pp. 248-249.

⁹⁵ *Ibid.*, p. 249.

⁹⁶ *Ibid.*, p. 250.

⁹⁷ Kleffner 2008, p. 219.

⁹⁸ *Ibid.*, p. 215.

proceedings or explicitly conveys an intention to that effect.”⁹⁹ Therefore, the self-referring state would in fact be waiving admissibility and its primacy to exercise jurisdiction over the situation in question, El Zeidy concludes.¹⁰⁰ He thus appears to be arguing that self-referring states have in fact waived their right to challenge the admissibility when they relinquished their jurisdiction over the situation to the Court. However, three years earlier El Zeidy had argued that “[...] based on the essence of the Statute, Uganda should be allowed to regain the opportunity to exercise its jurisdiction”, if it were to challenge the admissibility of the case.¹⁰¹ He pointed to the fact that the Rome Statute is based on the principle of complementarity which favours domestic jurisdictions and limits intervention by the Court to cases where states have failed to act properly. Therefore, if there is a chance that Uganda would be willing and able to proceed, the Court should defer the case.¹⁰²

Since the Court has not yet been confronted with a self-referring state bringing such a challenge, its jurisprudence cannot provide us with an answer. Therefore, absent a definitive answer to our question, we will assume, for the purpose of this thesis, that a state having referred its own situation to the ICC, such as Uganda, retains its right to subsequently challenge the admissibility of a case. A next step would be to determine when, by whom and on what grounds such a challenge can be brought before the Court.

2.3. CHALLENGES TO THE ADMISSIBILITY

Article 19 of the Rome Statute covers ‘Challenges to the jurisdiction of the Court or the admissibility of a case’. The second paragraph of this article determines by whom a challenge to the admissibility of a case can be made:

⁹⁹ El Zeidy 2008, p. 213.

¹⁰⁰ *Ibid.*, p. 214.

¹⁰¹ El Zeidy 2005, p. 109.

¹⁰² *Ibid.*

Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

- (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
- (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
- (c) A State from which acceptance of jurisdiction is required under article 12.

Therefore, the LRA commanders indicted by the Court could challenge the admissibility of the case against them under Article 19(2)(a). Based on Article 19(2)(b), Uganda may also challenge the admissibility, since it has jurisdiction over the case. This jurisdiction follows from the Ugandan nationality of the perpetrators, but can also be based on the fact that most crimes were committed on Ugandan territory and against Ugandan citizens. However, based on the latter, several other states may have jurisdiction as well, since the LRA has also committed crimes on the territories and against the civilians of the DRC, southern Sudan, and the Central African Republic. Therefore, these states might also be capable of challenging the admissibility of the case before the ICC under Article 19(2)(b). However, to be successful in their challenge, all states, including Uganda, have to prove they are genuinely investigating or prosecuting the case. Also, for a case to be inadmissible before the Court, “[...] national proceedings must encompass both the person and the conduct which is the subject of the case before the Court.”¹⁰³ This was determined by Pre-Trial Chamber I when it had to decide upon the Prosecutor’s request for arrest warrants for Thomas Lubanga Dyilo and Bosco Ntaganda. Warrants of arrest for several serious crimes had already been issued by the competent authorities in the DRC, however, these warrants did not contain any reference to the conscription of children, the crime for which the ICC Prosecutor intended to prosecute them.¹⁰⁴

¹⁰³ *Situation in the Democratic Republic of Congo*, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58 (ICC-01/04-01/07), Pre-Trial Chamber I, 10 February 2006, p. 18, par. 38.

¹⁰⁴ *Ibid.*, pp. 17-18, par. 37-40; Schabas clearly disagrees with the Chamber’s line of reasoning when he states that “[a]s for Lubanga himself, he must be delighted to find himself in The Hague facing prosecution for relatively less

Therefore, although Lubanga had already been in custody in the DRC for nearly a year, the case was considered to be admissible before the Court and “[...] in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability.”¹⁰⁵

Article 19(4) prescribes that “[t]he admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2.” This article also determines that a challenge will have to be made “[...] prior to or at the commencement of the trial.” Only in exceptional circumstances would it be possible for a challenge to be made more than once or at another time. Furthermore, according to Article 19(5) “[a] State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.” A challenge to the admissibility of a case may be brought “[...] on the grounds referred to in article 17 [...]”.¹⁰⁶

2.3.1. ARTICLE 17 OF THE ROME STATUTE

Article 17 of the Rome Statute, titled ‘Issues of admissibility’, determines when a case should be regarded as inadmissible by the ICC. Article 17(1) cites four grounds for inadmissibility: (a) the case is already being investigated or prosecuted by a state which has jurisdiction over it, unless that state is unwilling or unable genuinely to investigate or prosecute; (b) the case has been investigated by a state which has jurisdiction over it and that state has decided not to prosecute the person concerned, unless this decision resulted from that state’s unwillingness or inability genuinely to prosecute; (c) the person concerned has already been tried for the conduct in question, and prosecution by the ICC is not permitted under Article 20(3) of the Statute (*ne bis in idem*); and (d) the case is not of sufficient gravity to justify the exercise of jurisdiction by the ICC.

important offences concerning child soldiers rather than genocide and crimes against humanity.”, Schabas 2008, pp. 26-27.

¹⁰⁵ *Situation in the Democratic Republic of Congo*, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58 (ICC-01/04-01/07), Pre-Trial Chamber I, 10 February 2006, p. 19, par. 41.

¹⁰⁶ Rome Statute, Art. 19(2).

Paragraphs (2) and (3) of Article 17 answer the question what is meant by ‘unwillingness’ and ‘inability’. Article 17(2) sums up three situations when a state is to be considered unwilling genuinely to carry out proceedings: (a) when the proceedings are being undertaken for the purpose of shielding the person concerned from criminal responsibility; (b) when the proceedings are unjustifiably delayed; and (c) when the proceedings are being conducted in a manner which is inconsistent with an intent to bring the person concerned to justice. Article 17(3) determines that a state is unable when, due to a collapse or unavailability of its national judicial system, it does not have the ability to obtain the accused or the necessary evidence and testimony or otherwise carry out its proceedings. The issue of unwillingness, as opposed to that of inability, was somewhat difficult to negotiate since some delegations were concerned about state sovereignty and national constitutional guarantees against double jeopardy. Also, the Court passing judgment on the functioning of national justice systems was a sensitive issue. It was, however, concluded that if unwillingness was not going to be a ground for the Court to take over jurisdiction, states would be able to prevent the Court from taking jurisdiction merely by initiating an investigation or prosecution without subsequently handling the case adequately.¹⁰⁷

Since the question to be examined here is whether Uganda is unwilling genuinely to carry out proceedings against the leaders of the LRA, our focus should be on Article 17(2). According to Broomhall, “[t]he precise interpretation to be given to the terms of this paragraph must await the actual jurisprudence of the Court.”¹⁰⁸ The notion of unwillingness is related to the principle of good faith; when a state has acted genuinely in investigating or prosecuting, the case is inadmissible before the ICC. The three limitations on inadmissibility contained in Article 17(2) are considered to be an exhaustive list.¹⁰⁹ Therefore, a state is only unwilling when it has carried out sham proceedings, when proceedings are accompanied with unjustifiably

¹⁰⁷ Williams & Schabas 2008, pp. 610 & 617.

¹⁰⁸ Broomhall 1999, p. 145.

¹⁰⁹ Williams & Schabas 2008, pp. 611 & 622.

delays, or when proceedings are carried out in a manner inconsistent with an intent of bringing the person(s) concerned to justice. For our examination, the first scenario, that of Article 17(2)(a) which deals with sham proceedings undertaken for the purpose of shielding the person(s) concerned from criminal responsibility, is particularly interesting. The 2007 peace agreement between the Ugandan Government and the LRA made it possible to apply alternative sentences even to those most responsible for international crimes, which could perhaps indicate that Uganda intends to shield the persons in question from criminal responsibility when prosecuting them. We should, therefore, take a closer look at Article 17(2)(a).

2.3.2. ARTICLE 17(2)(A): SHIELDING

According to Article 17(2)(a) of the Rome Statute a state is unwilling genuinely to investigate or prosecute a particular case when

[t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; [...].

And Article 20(3)(a) of the Statute, which provides an exception to the principle of *ne bis in idem*, determines that a person may be prosecuted for a second time for the same conduct when the proceedings in the other court “[w]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.” Such shielding of a person from individual criminal responsibility is said to be the prime example of unwillingness genuinely to carry out proceedings.¹¹⁰ According to Williams and Schabas:

This subparagraph meets the concern of a State fulfilling the letter of the Statute by engaging in an investigation or a prosecution, but not the spirit, by in fact having a sham

¹¹⁰ Cárdenas Aravena 2006, p. 122.

proceeding to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.¹¹¹

What exactly is the meaning of the term ‘shielding’? Literally, ‘shielding’ means ‘protecting somebody’. “Linguistically, it does not presuppose a bad motive, but in the present context the meaning is clearly negative: it means protecting the perpetrator against due criminal responsibility.”¹¹² According to El Zeidy, this notion of shielding a perpetrator first appeared in the texts of articles proposed by the Working Group on Complementarity in the August 1997 session. The proposed text did not change much and can now be found in Article 17(2)(a).¹¹³ However, he also refers to the *Leipzig* trials of Germans before the *Reichsgericht* after the First World War as a relevant historic precedent with regards to the notion of shielding from criminal responsibility. During these trials, “[o]ut of the original list of more than 850 names, only a handful were found guilty and given light sentences.”¹¹⁴ A commission appointed to investigate the quality of these trials came to the conclusion that in most cases the accused had been acquitted when he should have been convicted, and even when the accused had been found guilty, an insufficient sanction was imposed. Looking at this precedent in light of Article 17(2)(a) of the Rome Statute, El Zeidy argues that a national decision may have been made for the purpose of shielding accused persons from criminal responsibility.¹¹⁵ “Had these cases been tried before an international tribunal, clearly the sentences would have been greater and carried out effectively”, he concludes.¹¹⁶

When Article 17(2)(a) uses the terms ‘proceedings’ and ‘national decision’, according to Kleffner, it refers to investigations and prosecutions and states’ decisions not to prosecute as mentioned in Article 17(1)(a) and (b). The term

¹¹¹ Williams & Schabas 2008, p. 623.

¹¹² Stigen 2008, pp. 259-260.

¹¹³ El Zeidy 2008, p. 171.

¹¹⁴ *Ibid.*, p. 172.

¹¹⁵ *Ibid.*, p. 173.

¹¹⁶ *Ibid.*, p. 174.

‘proceedings in the other court’ from Article 20(3)(a), on the other hand, refers to trial proceedings.¹¹⁷ And when Article 17(2)(a) speaks of shielding from ‘criminal responsibility’, it means criminal responsibility at any level, national or international.¹¹⁸ The article further refers to ‘the person concerned’, which, according to Stigen, does not mean that the state has “[...] to proceed against the right person as long as it proceeds in good faith (it reasonably believes that it is proceeding against the perpetrator).”¹¹⁹ When a state has prosecuted an international crime but with respect to another person than the Prosecutor of the ICC would like to prosecute, the case before the ICC is still admissible.¹²⁰

Kleffner poses the question whether it has to be established that all stages of the proceedings were conducted for the purpose of shielding the perpetrator, or whether it is sufficient to establish that a particular stage of the proceedings were conducted for this purpose for Articles 17(2)(a) or 20(3)(a) to be applicable.¹²¹ He believes the answer to this question depends

[...] upon whether the purpose of shielding of one particular stage of a proceeding, or of one particular decision not to prosecute, can effectively be prevented from materializing through subsequent proceedings or through a subsequent decision.¹²²

Furthermore, the shielding from criminal responsibility may be total or partial. In the case of total shielding, the state does not prosecute a person at all or acquits him or her. When the shielding is partial, “[...] the result is an inferior penalty.”¹²³ Also, when an international crime which falls within the jurisdiction of the Court is being prosecuted as an ordinary crime, even though the state’s legislation provides for the possibility of prosecuting it as an international crime, the accused may be shielded

¹¹⁷ Kleffner 2008, p. 135.

¹¹⁸ Stigen 2008, p. 260.

¹¹⁹ *Ibid.*, p. 261.

¹²⁰ *Ibid.*

¹²¹ Kleffner 2008, p. 138.

¹²² *Ibid.*, p. 139.

¹²³ Stigen 2008, p. 260.

from criminal responsibility. However, the decision to prosecute an international crime, such a genocide, as an ordinary crime, such as murder, could be understandable given the fact that genocide is much more difficult to prove.¹²⁴ “The essential is: has the state acted with the right intentions?”¹²⁵

2.3.2.1. *Devious intentions*

According to Article 17(2)(a) of the Rome Statute the proceedings must have been undertaken ‘for the purpose of’ shielding, according to Kleffner

[t]his formulation implies that the proceedings or the decision in question must be specifically directed at shielding; its rationale, and the intention that the author(s) had when adopting such a cause of (in)action, must have been to shield the person.¹²⁶

Given this focus on the intention of a state, the criterion of Article 17(2)(a) is subjective in nature, whereas the criteria of paragraphs (b) and (c) have a more objective nature.¹²⁷ Many states objected to the potential power of the Court to pass judgment on decisions and proceedings of national legal systems, and therefore argued against the inclusion of any subjective criteria.¹²⁸ However, “[s]ince the main purpose of adding a provision on ‘unwillingness’ was to preclude the possibility of sham trial aimed at shielding perpetrators, this criterion was easily included.”¹²⁹

An intention to shield a person from criminal responsibility is likely to require more than “[...] simple neglect or inadvertence.”¹³⁰ Instead, “[...] the Prosecutor must prove a devious intent on the part of a State, contrary to its apparent actions.”¹³¹ Therefore, the ‘state of mind’ of a state, as Kleffner calls it, must be examined, which

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Kleffner 2008, p. 135.

¹²⁷ El Zeidy 2008, p. 168; Olásolo 2005, pp. 150-151.

¹²⁸ Holmes 1999, p. 49.

¹²⁹ *Ibid.*, p. 50.

¹³⁰ Broomhall 1999, p. 146.

¹³¹ Arbour & Bergsmo 1999, p. 131.

raises the important question “[...] as to how the mindset of an abstract entity, such as a State, can be determined.”¹³² How does one go about proving the specific intent of a state to shield a perpetrator from criminal responsibility? Assessing these intentions will probably involve an evaluation of persons acting as state organs such as prosecutors and judges, as well as the collective intention of organs such as the legislative body.¹³³ However, given its subjective nature, a purpose of shielding will most likely be difficult to prove by means of direct evidence.¹³⁴ Therefore, a state’s intentions will, in most cases, have to be assessed on the basis of circumstantial evidence. In such cases, one has to determine what indications may constitute such circumstantial evidence.¹³⁵ According to Stigen, when making an assessment of national efforts, the Court should have due regard to the legitimate difficulties that states have to deal with, and “[a]s for the ‘unwillingness’ criterion, nothing more than a good faith effort is required.”¹³⁶ In general, one could say that

[...] any *intentional* deficiency or serious negligence in carrying out domestic proceedings that lead to negative results, through certain acts or omissions, might reflect the State’s intention to ‘shield a person from criminal responsibility’.¹³⁷

However, Stigen discusses in more detail several indications which may or may not reflect a lack of good faith, such as: Reluctance to cooperate with the ICC Prosecutor, inadequate legislation, limited access to the justice system, intimidation of actors in the proceedings, inappropriate assignment of the case, insufficient thoroughness of the proceedings, failure to take essential investigative steps or other deviations from the normal, inadequate collection and use of evidence, a decision against prosecution seems unwarranted, inadequate indictment, political interference, inadequate

¹³² Kleffner 2008, p. 135.

¹³³ *Ibid.*, p. 136.

¹³⁴ Stigen 2008, p. 259.

¹³⁵ Kleffner 2008, p. 136; Stigen 2008, p. 262.

¹³⁶ Stigen 2008, p. 262.

¹³⁷ El Zeidy 2008, p. 175.

outcome of the trial, and inadequate enforcement of sentence.¹³⁸ In the context of an ‘inadequate outcome of the trial’ as an indication that a state may have (partially) shielded the accused from criminal responsibility, Stigen states that “[a]n obvious way of shielding a perpetrator in a trial is to acquit erroneously or to impose an inadequate sentence.”¹³⁹

It must be determined whether the deviation from the adequate is sufficient so as to truly indicate a purpose of shielding; the penalty imposed must be compared to the level of punishment in the respective legal system, as the Rome Statute is not intended to assimilate national reactions. This is expressly provided in article 80.¹⁴⁰

Kleffner also mentions sentencing as a factor to be examined when assessing whether a state is shielding a perpetrator from criminal responsibility. An imposed sentence would reflect a purpose of shielding if “[...] it is manifestly insufficient in light of the gravity of the crime(s) in question and the form of participation of the accused.”¹⁴¹ However, he also stresses that one should be cautious with regards to this matter, because “[d]ifferent sentencing traditions and cultures, also in relation to the core crimes, leave a large margin of appreciation to States in determining what an adequate sentence is.”¹⁴² But when national courts within the same jurisdiction, without a good reason, adjudicate similar cases very differently this may be indicative of a purpose of shielding.¹⁴³ Like Stigen and Kleffner, Broomhall includes “[...] the imposition of a sentence out of all proportion to the gravity of the crime, [...]” in his list of indications which may evidence shielding.¹⁴⁴ Broomhall further considers that the ICC will, in its determination of whether a state is willing genuinely to prosecute, take cognizance of the extent to which sanctions provided for

¹³⁸ Stigen 2008, pp. 262-288.

¹³⁹ *Ibid.*, p. 285.

¹⁴⁰ *Ibid.*, p. 286.

¹⁴¹ Kleffner 2008, p. 137.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ Broomhall 1999, p. 146.

under the state's national law are considerate of the fact that the crimes in question are 'the most serious crimes of concern to the international community as a whole' in the sense of Article 5 of the Rome Statute. "The handing down of sentences clearly lacking a gravity commensurate with the facts could be taken by the Court as evidence of a 'purpose of shielding the person' [...]." ¹⁴⁵ It indeed seems reasonable to suggest that the imposition of a sanction which does not reflect the heinous character of the crime, is inconsistent with an intention of bringing the person concerned to justice. Perhaps it is also fair to come to the same conclusion when the possibility of such sentences is created, even before proceedings have commenced.

Cárdenas Aravena also refers to sentencing, but then in light of Article 20(3)(a). According to her, the analysis of 'the purpose of shielding' is for the most part the same as in the context of Article 17(2)(a), "[h]owever, the gravity of the sentence is a specific criterion to be considered when determining whether shielding should serve as an exception to the *ne bis in idem* principle." ¹⁴⁶ This seems to imply that 'the gravity of the sentence' is not a specific criterion to be considered within the context of Article 17(2)(a), which makes a certain amount of sense since the sentence can only be examined once it has actually been determined by national authorities. Cárdenas Aravena does point to the fact that not "[...] each acquittal or mild penalty for an individual accused of committing international crimes is to be interpreted as an indicator of the purpose of shielding." ¹⁴⁷ Decisive is whether the decision in question was based on the actual merits of the case or whether it was based on political wishes to shield the accused from criminal responsibility. ¹⁴⁸

Thus, a multitude of indicators, including the imposition of an inadequate sentence, should be examined when assessing a state's intentions. It should, however, be noted that it is impossible to exhaustively list all the indicators which may reflect a purpose of shielding. The Prosecutor has to examine the factual

¹⁴⁵ *Ibid.*, p. 153.

¹⁴⁶ Cárdenas Aravena 2006, p. 126.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

circumstances of each individual case.¹⁴⁹ Be that as it may, “[s]ometimes the national decision reflects a straightforward case of a State that is acting in bad faith”, which, according to several authors, is the case when a state passes a (blanket) (self-)amnesty law.¹⁵⁰

Kleffner points to the fact that in certain cases states consider the shielding to be “[...] a necessary step in the pursuit of a higher goal [...].”¹⁵¹ As an example he refers to the shielding of the leader of an insurrectional movement in order to persuade him to take part in a peace process. Even though such an ultimate aim may be commendable, according to Kleffner it does not render Article 17(2)(a) inapplicable.¹⁵² However, does a state really have the devious intent needed to fulfil the criterion of Article 17(2)(a) when it is only shielding someone from criminal responsibility in order to achieve a justifiable higher goal, such as peace after many years of bloodshed?

¹⁴⁹ El Zeidy 2008, p. 175; Stigen 2008, p. 259.

¹⁵⁰ See for example Cárdenas Aravena 2006, p. 130; El Zeidy 2008, p. 175; Kleffner 2008, p. 136; Stahn 2005, p. 714.

¹⁵¹ Kleffner 2008, p. 137.

¹⁵² *Ibid.*

3. UGANDA

For more than twenty years the people of Northern Uganda have lived in terror of an armed group calling itself the Lord's Resistance Army. The rebellion started in 1987 when several groups, including the LRA, formed to fight the new Museveni Government. "Whilst many of the other rebel groups were either defeated militarily or talked to, the LRA proved a hard nut to crack."¹⁵³ Therefore, the Government of Uganda decided to refer the situation to the ICC in December 2003, upon which the ICC started investigations in Northern Uganda in June 2004.¹⁵⁴ Once it had concluded these investigations, Pre-Trial Chamber II of the ICC issued warrants of arrest against five leaders of the LRA: Joseph Kony¹⁵⁵, Okot Odhiambo¹⁵⁶, Raska Lukwiya¹⁵⁷, Vincent Otti¹⁵⁸, and Dominic Ongwen¹⁵⁹. After the issuing of these warrants, the LRA decided it was time to enter into peace talks with the Ugandan Government. The Juba talks, named after the Sudanese city in which they were held, between the Government of Uganda and the LRA commenced in July 2006 under the mediation of the Government of Southern Sudan. As these talks proceeded it became clear that the ICC arrest warrants were a main point of discussion; the LRA declared itself absolutely unwilling to sign a peace agreement with the Ugandan Government as long as the warrants were still standing, while the Government argued that it would only request the ICC to withdraw its warrants once the LRA had signed a peace agreement. Nonetheless, on 29 June 2007 the Agreement on Accountability and Reconciliation ('2007 Agreement') was reached between the Government of the

¹⁵³ Apuuli 2008, p. 802.

¹⁵⁴ ICC Press Release, 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC' (ICC-20040129-44); ICC Press Release, 'Prosecutor of the International Criminal Court opens an investigation into Northern Uganda' (ICC-OTP-20040729-65).

¹⁵⁵ *Situation in Uganda*, Warrant of Arrest for Joseph Kony (ICC-02/04-01/05), Pre-Trial Chamber II, 27 September 2005.

¹⁵⁶ *Situation in Uganda*, Warrant of Arrest for Okot Odhiambo (ICC-02/04), Pre-Trial Chamber II, 8 July 2005.

¹⁵⁷ The proceedings against Raska Lukwiya were later terminated after his death was confirmed, see *Prosecutor v. Kony, Otti, Odhiambo, Lykwiya, Ongwen*, Decision to Terminate the Proceedings Against Raska Lukwiya (ICC-02/04-01/05), Pre-Trial Chamber II, 11 July 2007.

¹⁵⁸ *Situation in Uganda*, Warrant of Arrest for Vincent Otti (ICC-02/04), Pre-Trial Chamber II, 8 July 2005.

¹⁵⁹ *Situation in Uganda*, Warrant of Arrest for Dominic Ongwen (ICC-02/04), Pre-Trial Chamber II, 8 July 2005.

Republic of Uganda and the Lord's Resistance Army/Movement, which promotes "[...] national legal arrangements, consisting of formal and non formal institutions and measures for ensuring justice and reconciliation with respect to the conflict."¹⁶⁰ According to the 2007 Agreement formal courts will exercise jurisdiction over persons with particular responsibility for international crimes.¹⁶¹ The Juba talks were re-opened in February 2008, after which an Annexure to the Agreement on Accountability and Reconciliation ('2008 Annexure') was reached on 19 February 2008. "This Annexure sets out a framework by which accountability and reconciliation are to be implemented pursuant to the Principal Agreement, [...]"¹⁶² In particular, the 2008 Annexure provides for the establishment of a special division of the High Court of Uganda "[...] to try individuals who are alleged to have committed serious crimes during the conflict."¹⁶³ It should, however, be noted that the 2007 Agreement is yet to be signed and that neither the agreement nor the 2008 Annexure has been submitted to the Ugandan Parliament.¹⁶⁴

3.1. THE LRA AND JOSEPH KONY

From the start of the conflict, the Ugandan government portrayed Kony as a 'murderous rebel.' He called himself a liberator of the people, while terrorizing the very people he was liberating. Kony and the LRA did not express a coherent ideology. Their attacks were aimed at gaining food and supplies rather than gaining territory or making a political statement. Kony enshrouded himself with mysticism, claiming supernatural powers and communication with spirits. LRA fighters believe he is superhuman and under the guidance of the Holy Spirit, so they fear defying him.¹⁶⁵

¹⁶⁰ 2007 Agreement, Art. 2.1.

¹⁶¹ 2007 Agreement, Art. 6.1.

¹⁶² Annexure to the Agreement on Accountability and Reconciliation, 19 February 2008, ('2008 Annexure'), Art. 1.

¹⁶³ 2008 Annexure, Art. 7.

¹⁶⁴ See *Prosecutor v. Kony, Otti, Odhiambo, Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute (ICC-02/04-01/05), Pre-Trial Chamber II, 10 March 2009, p. 26, par. 49.

¹⁶⁵ Hanlon 2007, p. 300.

According to the ICC, the Lord's Resistance Army is an armed group carrying out an insurgency against the Government of Uganda and the Ugandan Army since at least 1987.¹⁶⁶ It operates as an army in a military-type hierarchy. Since 1987, the LRA has directed attacks against the Ugandan Army, also known as the Uganda People's Defence Force, and civilian populations. It has committed many brutal crimes including murder, sexual enslavement, mutilation, mass burnings of houses, looting of camp settlements, and abduction of civilians, including children, who are forced to be fighters and/or sex slaves for the LRA.¹⁶⁷ The LRA is notorious for this last crime; the kidnapping of children.

They are often forced to kill other kidnapped children who try to escape, and to mutilate, rape, torture, and even kill their own families. [...] To forestall this fate, thousands of children have become 'night commuters' – children who walk miles from rural areas to urban centers where they seek shelter in schools, bus stations, or on the streets to avoid being kidnapped from home or from displaced persons camps.¹⁶⁸

Joseph Kony is considered to be the Chairman and Commander-in-Chief of the LRA, with Vincent Otti as his Vice-Chairman and Second-in-Command.¹⁶⁹ Joseph Kony has been charged by the Prosecutor of the ICC with crimes against humanity and war crimes.¹⁷⁰ More specifically, he has been charged with 12 counts of crimes against humanity, including: sexual enslavement, rape, and murder; and 21 counts of war crimes, including: attacks against the civilian population, enlisting of children, cruel treatment, and pillaging.¹⁷¹ The majority of these crimes were committed at camps for internally displaced persons. The crimes Joseph Kony has been charged with are 'only' the crimes he has (allegedly) committed since 1 July 2002, when the

¹⁶⁶ *Situation in Uganda*, Warrant of Arrest for Joseph Kony (ICC-02/04-01/05), Pre-Trial Chamber II, 27 September 2005, pp. 2-3, par. 5.

¹⁶⁷ *Ibid.*, p. 3, par. 5 & 7.

¹⁶⁸ Keller 2008, p. 214.

¹⁶⁹ *Situation in Uganda*, Warrant of Arrest for Joseph Kony (ICC-02/04-01/05), Pre-Trial Chamber II, 27 September 2005, p. 3, par. 7 & 8.

¹⁷⁰ *Ibid.*, p. 5, par. 14.

¹⁷¹ *Ibid.*, pp. 12-19, par. 42.

Rome Statute entered into force¹⁷², because the ICC has no jurisdiction over crimes that have been committed before that time.¹⁷³

3.2. UGANDA'S SELF-REFERRAL

In December 2003 the President of Uganda decided to refer the situation concerning the LRA to the Court, upon which the Chief Prosecutor of the ICC, Luis Moreno-Ocampo, decided to open an investigation into the situation in June 2004.¹⁷⁴ Based on Article 53 of the Rome Statute, Mr. Moreno-Ocampo shall initiate an investigation unless he determines that there is no reasonable basis to proceed. In making his decision, the Prosecutor shall consider whether:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.¹⁷⁵

The reason behind the Ugandan self-referral was the fact that, although many rebel groups had been defeated in the past either militarily or through peace negotiations, this had failed with regard to the LRA. According to the Government of Uganda, the main reason it needed help with the situation concerning the LRA, was the fact that the LRA was not within its jurisdiction. As stated by the Attorney General of Uganda at the time of the self-referral, although the Ugandan judicial system is both willing

¹⁷² Uganda signed the Rome Statute on 17 March 1999 and ratified it on 14 June 2002, *see* <<http://www2.icc-cpi.int/Menu/ASP/states+parties/African+States/Uganda.htm>>. Therefore, under Art. 126(2) of the Rome Statute, the statute entered into force for Uganda on 1 September 2002. However, Uganda submitted a declaration under Art. 11(2) and 12(3) recognizing ICC jurisdiction as of 1 July 2002, *see* Akhavan 2005, p. 412.

¹⁷³ Rome Statute, Art. 11, 'Jurisdiction *ratione temporis*': "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute."

¹⁷⁴ ICC Press Release, 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC' (ICC-20040129-44); ICC Press Release, 'Prosecutor of the International Criminal Court opens an investigation into Northern Uganda' (ICC-OPT-20040729-65).

¹⁷⁵ Rome Statute, Art. 53(1).

and able to prosecute the alleged perpetrators of the atrocities committed since 1987, it “[...] had been unable to secure their arrest, principally because those alleged perpetrators operated from basis in Southern Sudan, as such beyond the reach of Ugandan law.”¹⁷⁶ One can, however, wonder how the ICC would be better able to apprehend these perpetrators than Uganda.

It has also been suggested that Uganda’s self-referral was only meant as a means to put pressure on the LRA to enter into peace talks with the Government. Schabas certainly believes this to be true: “The motivation of the Government of Uganda in making the ‘self-referral’ was obvious enough”, he claims.¹⁷⁷ This motivation was to put further pressure on the rebels, since “[...] the threat of prosecution might compel the leaders of the Lord’s Resistance Army to negotiate a peaceful settlement to the two-decade long war.”¹⁷⁸ The arrest warrants issued by the ICC did in fact seem to work as an incentive to bring the LRA to the negotiating table.¹⁷⁹ However, paradoxically during the peace negotiations between the LRA and the Government of Uganda, the arrest warrants of the ICC against the leaders of the rebel group turned out to be the main obstacle standing in the way of a peace agreement. After a final peace agreement has been reached, the Ugandan Government could consider to challenge the admissibility of the case before the ICC on the basis that it intends to prosecute the LRA leaders on a national level. It can bring such a challenge under Article 19(2)(b) of the Rome Statute in conjunction with Article 17(1)(a). The Court would then have to determine whether the Ugandan judicial system is willing and able genuinely to carry out the prosecutions against the rebel leaders. In this thesis the focus will be on the question of willingness, rather than ability. The 2007 Agreement reached between the LRA and the Ugandan Government seems to introduce the option for formal courts to apply alternative (and therefore perhaps inadequate) sanctions to those most responsible, which could

¹⁷⁶ *Prosecutor v. Kony, Otti, Odhiambo, Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute (ICC-02/04-01/05), Pre-Trial Chamber II, 10 March 2009, p. 19, par. 37.

¹⁷⁷ Schabas 2008, p. 19.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, pp. 19-20.

be a sign of unwillingness “[...] for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court [...]”¹⁸⁰. Before examining the level of willingness of the Government of Uganda, we should have a more detailed look at the 2007 Agreement to see exactly what possibilities it creates.

3.3. THE AGREEMENT ON ACCOUNTABILITY AND RECONCILIATION OF 29 JUNE 2007

The 2007 Agreement stipulates that formal courts shall exercise jurisdiction over those most responsible, presumably Joseph Kony and the other leaders who have been indicted by the ICC. It is, for instance, decided that formal justice measures shall be applicable “[...] to any individual who is alleged to have committed serious crimes or human rights violations in the course of the conflict.”¹⁸¹ Furthermore, the 2007 Agreement determines that

[f]ormal courts provided for under the Constitution shall exercise jurisdiction over individuals who are alleged to bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes, during the course of the conflict.¹⁸²

Also, the 2008 Annexure to the agreement stipulates that prosecutions, a term generally used in the context of formal criminal justice measures, “[...] shall focus on individuals alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions.”¹⁸³ For the prosecution of such individuals, the annexure determines that a special division of the High Court of Uganda shall be established.¹⁸⁴ The 2007 Agreement, however, also speaks of alternative justice mechanisms, which it defines as “[...] justice mechanisms not currently administered

¹⁸⁰ Rome Statute, Art. 17(2)(a).

¹⁸¹ 2007 Agreement, Art. 4.1.

¹⁸² 2007 Agreement, Art. 6.1.

¹⁸³ 2008 Annexure, Art. 14.

¹⁸⁴ 2008 Annexure, Art. 7.

in the formal courts established under the Constitution.”¹⁸⁵ Such traditional mechanisms are promoted by the agreement:

Traditional justice mechanisms, such as *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc* and *Tonuci Koka* and others as practiced in the communities affected by the conflict, shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation.¹⁸⁶

Culo Kwor, for instance, refers to the compensation to atone for homicide, and *Mato Oput* involves a traditional ritual practiced by the Acholi after parties in conflict attain full accountability and reconciliation.¹⁸⁷ However, as made evident by the provisions referred to above, the 2007 Agreement seems to guarantee that such traditional justice mechanisms will not be applied to the leaders of the LRA, who are most responsible for the crimes committed. Security Council Report, an independent organization, also reports that those close to the negotiations of the agreement

[...] have suggested that higher level persons bearing greater responsibility for serious crimes would be subject to trials before the Ugandan courts, while those implicated in more minor abuses, including child soldiers who had been abducted by the LRA, would be subject to traditional justice.¹⁸⁸

However, since only the leaders of the LRA have been indicted by the ICC, how Uganda deals with any other rebel is of no concern to the Court. Therefore the use of traditional justice mechanisms does not have to withstand the admissibility-test of

¹⁸⁵ 2007 Agreement, Art. 1.

¹⁸⁶ 2007 Agreement, Art. 3.1.

¹⁸⁷ 2007 Agreement, Art. 1.

¹⁸⁸ Security Council Report, Update Report No. 1, Uganda/LRA, 11 April 2008, available at <http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.4018489/k.17A7/Update_Report_No_1brUgandaLRAbr11_April_2008.htm>; Worden, for instance, also states that the 2008 Annexure “[...] would provide for prosecution in Uganda of senior LRA leaders most responsible for atrocities committed over the course of the country’s 20-year long civil conflict. The agreement also provides that lower level perpetrators will be held accountable by traditional justice mechanisms indigenous to Northern Uganda, where much of the violence occurred.”, S. Worden, ‘The Justice Dilemma in Uganda’, United States Institute for Peace (USIP), February 2008, p. 1, available for download at <<http://www.usip.org/resources/justice-dilemma-uganda>>.

Article 17 of the Rome Statute, only how Uganda would handle the prosecution of Joseph Kony and the other leaders will have to pass this test, in case Uganda would want to successfully challenge the admissibility of the case before the Court.

However, the possibility exists that relatively mild sanctions will be applicable even to those most responsible for the most serious international crimes. According to the 2007 Agreement,

[l]egislation shall introduce a regime of alternative penalties and sanctions which shall apply, and replace existing penalties, with respect to serious crimes and human rights violations committed by non-state actors in the course of the conflict.¹⁸⁹

Although it is indicated that such alternative penalties and sanctions shall “[...] reflect the gravity of the crimes or violations [...]”, they will also have to promote reconciliation and rehabilitation, and shall “[...] take into account an individual’s admissions or other cooperation with proceedings [...]”.¹⁹⁰ This seems to introduce the possibility of reducing sentences even for those most responsible, perhaps to a degree which in fact no longer reflects the gravity of the crimes committed. Is agreeing to such a possibility, indicative of unwillingness to genuinely carry out the prosecution of the LRA leaders for the purpose of shielding them from criminal responsibility for international crimes?

¹⁸⁹ 2007 Agreement, Art. 6.3.

¹⁹⁰ 2007 Agreement, Art. 6.4.

4. IS UGANDA UNWILLING GENUINELY TO PROSECUTE THE LEADERS OF THE LRA?

In other words, is the case against Joseph Kony, Okot Odhiambo, Vincent Otti, and Dominic Ongwen admissible before the ICC under Article 17(1)(a) of the Rome Statute? This question should be answered affirmatively if one were to conclude that the national proceedings are only undertaken by Uganda for the purpose of shielding these persons from criminal responsibility for crimes within the jurisdiction of the ICC.¹⁹¹ We should examine the impact of the complementarity principle in general on the present case before turning to the subject of shielding in particular.

4.1. COMPLEMENTARITY

One of the fundamental principles on which the ICC is based, is the principle of complementarity. Some would even state that this principle is the cornerstone of the entire Rome Statute. As we have seen, the inclusion of the principle of complementarity in the Rome Statute gives the Court a complementary nature, meaning it is complementary to national courts. Therefore, the ICC can only act when national legal systems are unable or unwilling to do so. When referring the situation concerning the LRA to the Court on 16 December 2003, Uganda stated it was unable to arrest the leaders of the LRA:

At the time, the Attorney General of Uganda stated that, 'while both willing and able' to prosecute the alleged perpetrators of the atrocities allegedly committed in Northern and Western Uganda during the preceding seventeen years, the Ugandan judicial system had been unable to secure their arrest, principally because those alleged perpetrators operated from bases in Southern Sudan, as such beyond the reach of Ugandan law.¹⁹²

¹⁹¹ See Rome Statute, Art. 17(2)(a).

¹⁹² *Prosecutor v. Kony, Otti, Odhiambo, Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute (ICC-02/04-01/05), Pre-Trial Chamber II, 10 March 2009, p. 19, par. 37.

Although “[e]verything would indicate, in fact, that Uganda has one of Africa’s better criminal justice systems, and that its courts are more than able to prosecute the leaders of the Lord’s Resistance Army”¹⁹³, the Government of Uganda believed it would be more appropriate and effective for the ICC to investigate and prosecute this case. This belief was based on several considerations, one of them being “[...] Uganda’s inability to arrest the persons who might bear the greatest responsibility for the relevant crimes.”¹⁹⁴ However, how would the Court be better able to arrest Joseph Kony and the other high-ranking rebel leaders than national authorities? According to El Zeidy, the ICC would in fact not be in a better position to arrest the LRA leaders, and he goes on to argue that

[s]o far, practice has proved this point, as Pre-Trial Chamber II’s activities in relation to the Uganda case have been slow since the issue of the arrest warrants against the five top LRA in September 2005. The Court also failed to secure the custody of the LRA leaders.¹⁹⁵

The Court, more specifically the Pre-Trial Chambers, may have the ability under Article 58 of the Rome Statute to issue warrants of arrest, for the execution of these warrants it is dependent upon states parties. As Article 59(1) of the Statute determines, “[a] State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question [...]” Jens Dieckmann, ICC Counsel for the Defence, also argued that

[...] the ICC does not have its own police force, and is therefore dependent on national authorities to effectuate the arrest. Uganda also entered into an extradition agreement with the Democratic Republic of Congo (DRC) in 2007 concerning the arrest and extradition of the LRA leaders from the territory of the DRC, and is therefore not dependent on the ICC cooperation regime to facilitate their arrest. To the contrary,

¹⁹³ Schabas 2008, p. 18.

¹⁹⁴ *Prosecutor v. Kony, Otti, Odhiambo, Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute (ICC-02/04-01/05), Pre-Trial Chamber II, 10 March 2009, p. 20, par. 37.

¹⁹⁵ El Zeidy 2008, p. 216.

publicizing and reaffirming the ICC's primacy over the case could simple render it more difficult for national authorities to effectuate the defendant's arrest and surrender, as the LRA have on multiple occasions stated that their reluctance to accede to peace negotiations is due to the outstanding ICC arrest warrants.¹⁹⁶

Uganda has clearly shown a willingness to apprehend the suspects. As stated by Dieckmann, the Government of Uganda has entered into an extradition agreement with the DRC relating to the arrest and extradition of LRA leaders. Also, in December 2008 the militaries of Uganda, the DRC and Southern Sudan launched 'Operation Lighting Thunder', which was directed against LRA bases in eastern DRC. It was reported that the main camp of Joseph Kony was destroyed.¹⁹⁷ Furthermore, in March 2009 Ugandan troops were able to capture Thomas Kwoyelo, a senior LRA officer and agreement was reached between the president of the DRC and President Museveni to let Ugandan troops continue to pursue the LRA (by helicopter) in northern DRC.¹⁹⁸ However, attempts to arrest the indicted rebel leaders have unfortunately failed so far, proving Uganda's inability to arrest the leaders of the LRA, as well as the Court's inability to execute its warrants of arrest. Since in this respect the ICC itself is as much unable as Uganda, perhaps this is not the kind of inability the Rome Statute is referring to in Article 17. Although Article 17(3) does refer to an inability to obtain the accused, it blames this inability to "[...] a total or substantial collapse or unavailability of its national judicial system [...]." Uganda's judicial system is, however, not unavailable nor collapsed totally or substantially. In fact, Uganda is considered to have one of Africa's better criminal legal systems, which is recognized for its independence.¹⁹⁹ Furthermore, to specifically address the situation concerning the LRA, the 2008 Annexure provides for the establishment of a special division of the High Court of Uganda "[...] to try individuals who are alleged

¹⁹⁶ *Prosecutor v. Kony, Otti, Odhiambo, Ongwen*, Submission of observations on the admissibility of the Case under article 19(1) of the Statute (ICC-02/04-01/05), Pre-Trial Chamber II, 18 November 2008, pp. 18-19, par. 43.

¹⁹⁷ Security Council Report, Northern Uganda/LRA, historical chronology, available at <<http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.2880391/>>.

¹⁹⁸ *Ibid.*

¹⁹⁹ Akhavan 2005, p. 415; Schabas 2008, p. 18.

to have committed serious crimes during the conflict.”²⁰⁰ The prosecutions to be conducted by this special division will be focusing on those who “[...] alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions.”²⁰¹ According to Worden, the Ugandan High Court “[...] is generally well-regarded and can be a viable institution for fulfilling the prosecution provisions of the Accountability Agreement” and “[t]he High Court and Supreme Court are viewed to have integrity and have an established record of judgments.”²⁰² In May 2008 several judges were selected to serve on the special division by the Principal Judge of the High Court of Uganda, and a Transitional Justice Working Group was established to examine whether the enactment of new legislation for the special division would be necessary. Also, a War Crimes Unit has been established, which is staffed by six prosecutors who will receive special training and it is anticipated that they will be accompanied by additional Ugandan prosecutors who are serving in international criminal tribunals at the moment.²⁰³ Furthermore, the Coalition for the International Criminal Court reports that on 10 March 2010 the Ugandan Parliament passed the 2006 International Criminal Court Bill.²⁰⁴ This bill provides for the implementation of the Rome Statute in Ugandan law, and one of its purposes is “to enable Ugandan courts to try, convict and sentence persons who have committed crimes referred to in the Statute.”²⁰⁵ The ICC Bill makes the international crimes of genocide, crimes against humanity and war crimes prosecutable and punishable

²⁰⁰ 2008 Annexure, Art. 7.

²⁰¹ 2008 Annexure, Art. 14.

²⁰² S. Worden, ‘The Justice Dilemma in Uganda’, United States Institute for Peace (USIP), February 2008, p. 9, available for download at <<http://www.usip.org/resources/justice-dilemma-uganda>>.

²⁰³ *Prosecutor v. Kony, Otti, Odhiambo, Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute (ICC-02/04-01/05), Pre-Trial Chamber II, 10 March 2009, p. 25, par. 47.

²⁰⁴ Coalition for the International Criminal Court, Uganda, available at <<http://www.coalitionfortheicc.org/?mod=country&iduct=181>>; a recent report by Human Rights Watch also refers to this international crimes bill, see Human Rights Watch, ‘Trail of Death. LRA Atrocities in Northeastern Congo’, 28 March 2010, pp. 51-52, available for download at <<http://www.hrw.org/en/reports/2010/03/29/trail-death-0>>.

²⁰⁵ 2006 International Criminal Court Bill, Art. 2(g).

under Ugandan law.²⁰⁶ Given all these adjustments made to the judicial system, the Government of Uganda would seem to be very willing to prosecute the leaders of the LRA. Also, Uganda's criminal justice system appears to be able to carry out this task of prosecuting international crimes.²⁰⁷

However, when examining the willingness (and ability) of Uganda to genuinely prosecute the leadership of the LRA, one cannot disregard the signs indicative of possible unwillingness to genuinely carry out such prosecutions. For instance, in 1998 an Amnesty Bill was introduced in the Parliament, which passed into the 2000 Amnesty Act.²⁰⁸ This Act provides that amnesty is granted to any Ugandan who at any time since 26 January 1986 has "[...] engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda [...]"²⁰⁹ To receive amnesty, it is required that a person:

- (a) reports to the nearest Army or Police Unit, a Chief, a member of the Executive Committee of a local government unit, a magistrate or a religious leader within the locality;
- (b) renounces and abandons involvement in the war or armed rebellion;
- (c) surrenders at any such place or to any such authority or person any weapons in his or her possession; and
- (d) is issued with a Certificate of Amnesty as shall be prescribed in regulations to be made by the Minister.²¹⁰

The Act defined 'amnesty' as "[...] a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State."²¹¹ It could be argued that the enactment of such a general Amnesty Act reflects an

²⁰⁶ 2006 International Criminal Court Bill, Art. 7, 8 & 9.

²⁰⁷ Although this thesis focuses more on 'willingness' rather than 'ability', it could be argued that the two concepts are interrelated to a certain degree, since the more a state provides its legal system with the ability to carry out genuine proceedings, the more that state appears willing to actually carry out genuine proceedings.

²⁰⁸ Apuuli 2006, p. 183.

²⁰⁹ 2000 Amnesty Act, Art. 3(1).

²¹⁰ 2000 Amnesty Act, Art. 4(1).

²¹¹ 2000 Amnesty Act, Art. 2.

unwillingness to prosecute those who committed crimes during the conflict, since a person who has been granted amnesty “[...] shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the cause of the war or armed rebellion.”²¹² However, President Museveni has indicated he intends to amend the 2000 Amnesty Act “[...] so as to exclude the leadership of the LRA, ensuring that those bearing the greatest responsibility for the crimes against humanity committed in Northern Uganda are brought to justice.”²¹³ It is not completely clear whether this envisaged adjustment has actually been enacted, but “[u]nder a 2006 amendment to the amnesty law, the Minister of Internal Affairs can declare an individual ineligible if the parliament agrees [...]”²¹⁴ This amendment to the 2000 Amnesty Act makes it therefore possible to exclude the LRA leaders from being granted amnesty, which may be indicative of willingness to prosecute them. The 2000 Amnesty Act would remain applicable to other LRA fighters, however, since most of them have been forcibly recruited²¹⁵, it could be argued they deserve to be granted amnesty. As explained before, since only four LRA rebels are currently under indictment by the ICC, whether Uganda provides amnesty for all other rebels, is of no concern to the Court.

Another possible indication of unwillingness to prosecute on the part of Uganda is the fact that it referred the situation to the ICC in the first place, thereby perhaps implying it was not willing to deal with it itself. As El Zeidy argues, it seems obvious that when a state has decided not to take any action from the start and refers the situation to the Court, “[...] this could be seen as *prima facie* evidence that the situation is admissible.”²¹⁶ However, if one examines Article 17(2) of the Rome Statute closely and interprets it strictly, it follows that unwillingness can only be determined when one of the criteria from the exhaustive list in the article is met.

²¹² 2000 Amnesty Act, Art. 3(2).

²¹³ ICC Press Release, ‘President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC’ (ICC-20040129-44).

²¹⁴ S. Worden, ‘The Justice Dilemma in Uganda’, United States Institute for Peace (USIP), February 2008, p. 6, available for download at <<http://www.usip.org/resources/justice-dilemma-uganda>>.

²¹⁵ It is suggested that over 85% of the LRA forces consist of abducted children, see Apuuli 2004, p. 401, n. 44.

²¹⁶ El Zeidy 2005, p. 102.

Here a problem arises because the criterion of waiver is not mentioned in article 17(2). In other words, a State that preferred from the outset to submit the situation to the Court is nowhere defined in paragraph 2.²¹⁷

Furthermore, one could argue that a state cannot just set aside its duty to prosecute, as referred to in Preamble Paragraph 6 of the Rome Statute, by simply claiming to be unwilling or unable when it is in fact willing and able. In the case of Uganda, however, the government never claimed to be unwilling and even stated it was actually willing to prosecute, it had just been unable to apprehend the suspects.²¹⁸ This, taken together with the establishment of the special division of the High Court, the introduction of the ICC bill, the amendment to the 2000 Amnesty Act, and the continuing efforts to arrest the leaders of the LRA provide us with a multitude of evidence that Uganda is willing to genuinely prosecute the persons in questions.

There is, however, one other indication of possible unwillingness we have not analysed yet, which is the possibility created by the 2007 Agreement of applying alternative (and therefore possibly inadequate) sentences even to those most responsible. It might be argued this is a sign of shielding in the sense of Article 17(2)(a) of the Rome Statute, which would mean that Uganda can be regarded as unwilling after all, and the case would remain admissible before the ICC.

4.1.1. SHIELDING

When a seemingly genuine prosecution produces a mild sentence which is inconsiderate of the gravity of the crime committed, the prosecution could have been undertaken solely for the purpose of shielding the accused from actual criminal responsibility. However, the leaders of the LRA have not yet seen the inside of a courtroom, let alone heard sentences being imposed upon them. Therefore, why should we, at this time, examine whether the Government of Uganda is trying to

²¹⁷ *Ibid.*

²¹⁸ See *Prosecutor v. Kony, Otti, Odhiambo, Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute (ICC-02/04-01/05), Pre-Trial Chamber II, 10 March 2009, p. 19, par. 37.

shield the indicted rebel leaders? As discussed in paragraph 3.3., the 2007 Agreement between the Ugandan Government and the LRA provides for the use of ‘alternative penalties and sanctions’ by formal courts, even with respect to ‘serious crimes and human rights violations’.²¹⁹ Although these penalties are supposed to ‘reflect the gravity of the crimes’, they shall also ‘promote the rehabilitation of offenders’ and take into account any cooperation with the proceedings.²²⁰ Neither the 2007 Agreement nor the 2008 Annexure provide any specification of the alternative sanctions. As Burke-White and Kaplan explain,

[d]epending on how such penalties are ultimately crafted, they might or might not satisfy Article 17 of the Statute, namely that the proceedings were not intended to shield the accused and that they were consistent with ‘an intent to bring the person concerned to justice’.²²¹

Although proceedings against the LRA leaders have not yet commenced, even the introduction of a regime of alternative sanctions to ‘replace existing penalties’²²², could be viewed as an intention to shield them.²²³ The current sentencing regime of Uganda provides for a variety of sentences. According to the Ugandan Penal Code Act, the ‘general punishment for misdemeanours’, for example, is “[...] imprisonment for a period not exceeding two years.”²²⁴ However, the death penalty is also provided for²²⁵, whereas the ICC could maximally impose a prison sentence of

²¹⁹ 2007 Agreement, Art. 6.3.

²²⁰ 2007 Agreement, Art. 6.4.

²²¹ Burke-White & Kaplan 2009, p. 269.

²²² 2007 Agreement, Art. 6.3.

²²³ See also Burke-White & Kaplan 2009, p. 273: “[...] should the Ugandan government revise the applicable penalties available to the special division, as suggested by the June 2007 Agreement and demanded by the LRA, to provide far lighter sentences, or even alternative sanctions such as house arrest, such a sentencing regime could be seen by the [ICC Pre-Trial Chamber II] as a means of shielding the accused from the ICC or as inconsistent with an intent to bring them to justice.”

²²⁴ Penal Code Act, Art. 22.

²²⁵ See for example Penal Code Act, Art. 124: “A person convicted of rape is liable to suffer death” and Art. 189: “Any person convicted of murder shall be sentenced to death.” The 2006 ICC Bill, which provides for the punishment of genocide, crimes against humanity and war crimes, also refers to the penalties prescribed by the Penal Code Act. For instance, Art. 7(3)(a) of the ICC Bill determines that the penalty for genocide is “if the offence involves the wilful killing of a person, the same as the penalty for murder prescribed by the Penal Code Act.”

no more than 30 years or “[a] term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.”²²⁶ Therefore, under the present regime, Kony might even face the death penalty if prosecuted in Uganda, which would be consistent with an intent to bring him to justice.²²⁷ However, the 2007 Agreement seems to arrange a revision of the present sentencing regime by replacing it with a regime of alternative sanctions. When or if this agreement is signed, the outcome of future national prosecutions would still not be set in stone. The judges of the High Court of Uganda, who will be ruling on the case against the LRA leaders, are supposed to perform their task independently as determined by the Constitution of the Republic of Uganda in Article 128(1): “In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.” Therefore, they should base their judicial ruling on the sentencing regime provided for by the Penal Code Act rather than the regime as suggested in a political agreement such as the 2007 Agreement. However, we cannot predict how the judges will decide. In this context, Burke-White and Kaplan distinguish between two approaches to the sentencing issue: “The procedural approach would look at the range of potential sentences available to the domestic court; the outcome approach would look at the actual sentences given.”²²⁸ They conclude that the ICC may have to follow the outcome approach, therefore the Pre-Trial Chamber may

[...] have to render a decision on admissibility after sentencing by the domestic court so as to be able to consider the difference between the sentence given and typical sentences within a jurisdiction to determine if a ‘national decision was made for the purpose of shielding the person concerned from criminal responsibility’ (Article 17(2)(a) ICCSt.).²²⁹

²²⁶ Rome Statute, Art. 77(1)(b).

²²⁷ See also Burke-White & Kaplan 2009, p. 273.

²²⁸ Burke-White & Kaplan 2009, pp. 273-274.

²²⁹ *Ibid.*, p. 274.

However, even if the sentences given by the Ugandan judicial system to the rebel leaders would be indicative of shielding, there would have to exist an intention to shield. Under Article 17(2)(a) of the Rome Statute, the Government of Uganda has to have a devious intent to shield the leaders of the LRA from criminal responsibility. Is this the case?

As made evident by the elaborate peace negotiations prior to the enactment of the 2007 Agreement and the 2008 Annexure, the main intention of the Ugandan Government appears to be the achievement of peace. Would the pursuit of such a higher goal not take away any devious intentions? Not according to Kleffner, who believes, as we have seen in paragraph 2.3.2.1., that although some states consider shielding to be necessary in the pursuit of a higher aim, to have such an ultimate goal does not render Article 17(2)(a) inapplicable.²³⁰ One could disagree, since in certain situations it might be necessary to place peace above justice. Such reasoning is in line with, for instance, Article 16 of the Rome Statute which determines that the United Nations Security Council may defer an ICC investigation or prosecution in the interest of international peace and security. The purpose of Article 16, titled 'Deferral of investigation or prosecution', was for the Security Council to be able, "[...] under its primary responsibility for the maintenance of peace and security, to set aside the demands of justice at a time when it considered the demands of peace to be overriding; [...]."²³¹ Therefore, if the suspension of ICC proceedings against a leader, such as Kony, would allow for the conclusion of a peace agreement, peace should be given precedence.²³² Although it would obviously be favourable to achieve both peace and justice, this might unfortunately not be possible in some situations. As Hanlon argues, Ugandans themselves might even prefer peace above justice: "The local culture of Uganda, wanting peace above all else, is at odds with the Western world, wanting justice as it is known in Western jurisprudence."²³³ Therefore, if the

²³⁰ Kleffner 2008, p. 137.

²³¹ Cryer, Friman, Robinson & Wilmschurst 2008, p. 138.

²³² *Ibid.*

²³³ Hanlon 2007, p. 298.

Security Council is allowed to provide for a deferral in the interest of peace, why would the Ugandan Government have devious intentions when it arranges for the possibility of lighter sentences in the same interest?

If we were to conclude, on the basis of the foregoing, that Uganda does not intent to shield the leaders of the LRA from criminal responsibility, and it is otherwise as willing and able as it appears to be to prosecute them, it should, under the principle of complementarity, be given the opportunity to do so. How could this be arranged?

4.2. DEFERRAL

One option to arrange for the prosecution of the LRA leaders on a national level, would be for the Government of Uganda to challenge the admissibility of the case before the ICC. It can do so on the basis of Articles 17(1)(a) and 19(2)(b) of the Rome Statute. On 10 March 2009, Pre-Trial Chamber II already determined that the case was admissible under Article 17 of the Rome Statute. It appears, however, that this was not a final determination. According to the Chamber's interpretation of several provisions of the Rome Statute,

[...] the determination of admissibility is meant to be an ongoing process throughout the pre-trial phase, the outcome of which is subject to review depending on the evolution of the relevant factual scenario. Otherwise stated, the Statute as a whole enshrines the idea that a change in circumstances allows (or even, in some scenarios, compels) the Court to determine admissibility anew.²³⁴

The Chamber furthermore determined that the 2007 Agreement has not yet been signed and that both the agreement and the 2008 Annexure have not yet been submitted to the Parliament, and

²³⁴ *Prosecutor v. Kony, Otti, Odhiambo, Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute (ICC-02/04-01/05), Pre-Trial Chamber II, 10 March 2009, p. 16, par. 28.

[i]t is not until both documents can be regarded as fully effective and binding upon the parties that a final determination can be made regarding the admissibility of the Case, since the Chamber will only be in a position to assess the envisaged procedural and substantive laws in the context and for the purposes of article 17 of the Statute after they are enacted and in force.²³⁵

Therefore, before challenging the admissibility of the case, Uganda should perhaps take the (final) step of submitting both the 2007 Agreement and the 2008 Annexure to its Parliament and making it binding upon both parties, after which Pre-Trial Chamber II might be inclined to rule differently with regard to the admissibility of the case.

Another option for the deferral of the proceedings against the rebel leaders could be Article 53(4) of the Rome Statute, which provides the ICC Prosecutor with the possibility to “[...], at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.” Based on Uganda’s numerous efforts to enhance its criminal judicial system in order to make it capable of genuinely prosecuting the LRA leaders, the Prosecutor could perhaps reconsider his decision to initiate an investigation. According to Ssenyonjo, it would be in the interests of justice for the Prosecutor to use his discretionary power under Article 53(4) to suspend his prosecution in the present case, whereas “[...] it would not be in the interests of justice to interfere with a reconciliation mechanism to bring an end to the nearly two decades of the conflict.”²³⁶ A reconsideration by the Prosecutor under Article 53(4) would also be in accordance with ‘the positive approach to complementarity’, as promoted by the Office of the Prosecutor in its Prosecutorial Strategy. Following this positive approach, the Prosecutor should encourage genuine national proceedings where possible.²³⁷

²³⁵ *Ibid.*, p. 26, par. 49.

²³⁶ Ssenyonjo 2005, p. 428.

²³⁷ See Prosecutorial Strategy 2009-2012, The Office of the Prosecutor, 1 February 2010, p. 5.

4.3. ARTICLES 19(11) AND 20(3)(A) AS A SAFETY NET

If the case were to be deferred to Uganda, it would be able to prosecute the LRA leaders on a national level. As determined previously, the Ugandan judicial system is considered to be one of Africa's best and its High Court is viewed as having an established record of judgments, presumably it will therefore be capable of carrying out genuine proceedings. However, what could be done if the sentences imposed upon the rebel leaders turn out to be (severely) inadequate in light of the gravity of the crimes committed, or shielding becomes evident in some other manner? Holmes refers to Article 19(11) of the Rome Statute, which provides that when an investigation has been deferred, "[...] the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings."²³⁸ States parties are obliged to comply with such a request in good faith under Article 26 of the Vienna Convention on the Law of Treaties²³⁹ and customary international law.²⁴⁰ The Prosecutor can thereafter make an informed decision whether to continue deferral or proceed with an investigation after all. According to Holmes,

[t]his provision has the advantage of demonstrating to the State that the Prosecutor remains interested in the situation and may reactivate his or her investigation should doubts emerge as to the genuineness of the State's actions.²⁴¹

Therefore, if the requested information provided for by the Government of Uganda leads the ICC Prosecutor to believe that shielding is taking place, Article 19(11) provides him with a viable means of regaining control over the investigation.

Another way for the Prosecutor of the ICC to do this could be by means of Article 20(3)(a) of the Rome Statute, which provides an exception to the principle of

²³⁸ Rome Statute, Art. 19(11).

²³⁹ Vienna Convention on the Law of Treaties, Art. 26, 'Pacta sunt servanda': "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

²⁴⁰ Hall 2008, p. 667; Hall does note that "[...] the willingness of a State to provide information or access has no bearing on the question whether it is able or willing to investigate.", Hall 2008, p. 667, n. 92.

²⁴¹ Holmes 2002, p. 683.

ne bis in idem. The core idea of this principle is that no person should be prosecuted twice for the same offence.²⁴² Exceptions to the *ne bis in idem* principle “[...] seem to stem from the basic *raison d’être* of international jurisdiction: it is to step in when national justice fails.”²⁴³ Article 20(3)(a) provides that

[n]o person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.

The term ‘has been tried’ as used here can be interpreted in various ways, however, the Court will in any case be barred from exercising its jurisdiction when national authorities have undertaken a *bona fide* effort to prosecute.²⁴⁴ Furthermore, truth and reconciliation commissions as well as blanket amnesties granted without formal investigation or prosecution do not fall under the notion ‘has been tried’. Therefore, the LRA rebels who have been granted amnesty or have been dealt with by means of alternative justice mechanisms can definitively still be prosecuted by the ICC, since they are considered to have not been tried and the *ne bis in idem* principle does not apply to them. The rebel leaders, on the other hand, will most likely be formally prosecuted by Ugandan authorities, in which case the *ne bis in idem* principle would bar the Court from prosecuting them again. However, Tallgren and Reisinger Coracini note that the inadequacy of a sentence could fall under the exceptions of Article 20(3).²⁴⁵ Therefore, shielding can, as with Article 17(2)(a), follow from inadequate sentencing, meaning that if the leaders of the LRA have been sentenced too mildly in light of the gravity of the crimes they had been charged with, the ICC may be able to prosecute them for a second time under Article 20(3)(a).

²⁴² Tallgren & Reisinger Coracini 2008, p. 670.

²⁴³ *Ibid.*, p. 688.

²⁴⁴ *Ibid.*, p. 691.

²⁴⁵ *Ibid.*, p. 689.

Therefore, Articles 19(11) and 20(3)(a) would appear to offer the ICC Prosecutor a safety net; they provide him with viable means of regaining control over the case if it were to become apparent that the Government of Uganda is in fact shielding the LRA leaders from criminal responsibility.

5. CONCLUSION

As evidenced by the recent horrific four-day crime spree committed by LRA rebels in the DRC, this brutal rebel movement is yet to retire and a peaceful solution to the conflict that has been lingering on for more than two decades remains to be found. Will this solution be found in The Hague or in the native country of the rebels in question, Uganda? The ICC, on the one hand, has issued arrest warrants for the high commanders of the LRA and intends to hold them accountable under international criminal law for the international crimes they have committed, by means of formal legal proceedings. Uganda, on the other hand, traditionally uses less than formal (legal) proceedings and has been trying to negotiate peace by offering promises of alternative sanctions if the rebel leaders lay down their weapons and surrender themselves. Does the Government of Uganda therefore intend to shield these rebels from criminal responsibility? Perhaps. However, it is stuck between two seemingly irreconcilable demands; demands for justice from the international community and demands for peace from its own citizens.

The term 'shielding' brings with it a profoundly negative judgment of a state's (in)actions and should therefore not be used lightly. A good argument can be made that Uganda is in fact not trying to shield the indicted LRA rebels and that it is willing to genuinely prosecute them. Furthermore, one can wonder whether the Ugandan Government actually has the devious intentions it needs to have in order to fulfil the Rome Statute's definition of 'shielding', since it is merely trying to achieve peace after many years of civil strife. It should obviously not be promoted that serious international crimes go unpunished, but at this moment it does not appear that impunity will be the result of national proceedings conducted by Ugandan authorities, who are being transformed so that its organs will be able to prosecute the LRA leaders for international crimes. We should therefore come to the conclusion that it would be in accordance with the principle of complementarity to allow Uganda to carry out proceedings against the leaders of the LRA nationally.

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