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## Amnesty or Accountability: The Fate of High-Ranking Child Soldiers in Uganda's Lord's Resistance Army

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# Amnesty or Accountability: The Fate of High-Ranking Child Soldiers in Uganda's Lord's Resistance Army

*"Abducted children are trained to be used as weapons. They are like guns. So when you capture a child soldier—how can you hold them accountable? Why would you punish the gun and not the hand that holds it?"*<sup>1</sup>

## ABSTRACT

*In May 2013, Uganda surprisingly resurrected its amnesty provision for two more years<sup>2</sup> after having let it lapse only a year earlier.<sup>3</sup> Uganda's vacillation likely represents its competing desires to grant amnesty to low-level actors in the Lord's Resistance Army (LRA) and to end impunity for decades of gross human rights violations in accordance with international criminal law. However, instead of crafting an amnesty provision that would satisfy both of these needs, Uganda reinstated the same "blanket" amnesty, or all-inclusive pardon, found in the Amnesty Act of Uganda (2000) (Act).<sup>4</sup> As a*

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1. McLeod Baker Ochola II, Retired Bishop of Kitgum Diocese, On the Future of Amnesty in Uganda, Statement at Forum in Gulu, Uganda (Aug. 29, 2012).

2. See Yasiin Mugerwa, *Lawmakers Agree to Extend Amnesty Act*, DAILY MONITOR (May 16, 2013, 1:00 AM), <http://www.monitor.co.ug/News/National/Lawmakers-agree-to-extend-Amnesty-Act/-/688334/1854016/-/24j4chz/-/index.html> [<http://perma.cc/85TL-T3BD>] (archived Jan. 20, 2014) (discussing legislators' extension of the Amnesty Act); see also Cissy Makumbi & James Owich, *Acholi Leaders Welcome Extension of Amnesty*, DAILY MONITOR (May 28, 2013, 5:08 PM), <http://www.monitor.co.ug/News/National/Acholi-leaders-welcome-extension-of-amnesty/-/688334/1865314/-/m8wd59/-/index.html> [<http://perma.cc/4N4G-VLCQ>] (archived Jan. 20, 2014) (citing pressure from northern religious leaders as the force behind reenacting the Act).

3. See The Amnesty Act (Declaration of Lapse of the Operation of Part II), S.I. 2012 No. 34 (2012) (Uganda) [hereinafter The Amnesty Act (Declaration of Lapse)] (declaring a lapse in the amnesty provision of the Act in May 2012).

4. *Id.*; Elizabeth B. Ludwin King, *Amnesties in a Time of Transition*, 41 GEO. WASH. INT'L L. REV. 577, 582–83 (2010) ("Amnesties typically are executed in one of two ways. 'Blanket amnesties' cover all crimes, regardless of who committed them.

result, high-level LRA actors like Thomas Kwoyelo and Caesar Acellam find themselves in a legal purgatory of indefinite detention: too culpable in the eyes of Ugandan officials to release, but too difficult to prosecute as they are entitled to amnesty under the terms of the Act.<sup>5</sup>

This Note proposes a factor-based amnesty process, which would allow Ugandan officials to determine the level of culpability of each applicant and grant or deny amnesty accordingly. This case-by-case method is likely the most effective way of ensuring that a balance is struck between the aspirations of the people of a war-torn country for peace and the increasingly rigorous demands for justice in international criminal law.

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‘Partial amnesties,’ conversely, are more limited; they only provide immunity for certain crimes or for select groups of perpetrators.”).

5. See Thomas Kwoyelo alias Latoni v. Uganda [2011] UGCC 10 (Const. Pet. No. 036/11) (Uganda) available at <http://www.ulii.org/ug/judgment/2011/10> [<http://perma.cc/VJ6A-QWKP>] (archived Jan. 20, 2014) (ruling that Kwoyelo, like other high-level actors in the LRA, is entitled to amnesty under the Act); see also Matthew C. Kane, *The Indefinite Detention of Thomas Kwoyelo*, JURIST (Feb. 18, 2013), <http://jurist.org/forum/2013/02/matthew-kane-kwoyelo-detention.php> [<http://perma.cc/U7K2-LN5X>] (archived Jan. 20, 2014) (commenting on the Ugandan government’s continued confinement of Kwoyelo and Acellam).

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## I. INTRODUCTION

In November 2012, I gathered with a handful of former child soldiers under the shade of an impressive acacia tree in Gulu, Uganda.<sup>6</sup> We listened as a representative of the Amnesty Commission (Commission), the Ugandan agency responsible for pardoning those involved in armed rebellion against the government, gave an informal presentation on the amnesty process.<sup>7</sup> The recently returned combatants were especially eager to know their legal fate; as only months before their return, the government of Uganda had repealed the portions of the Amnesty Act of Uganda (2000) (Act) that gave the Commission the authority to grant amnesty.<sup>8</sup>

The Commission officer intimated that the returnees would likely be pardoned—a kind untruth as amnesty was legally unfeasible at the time. A man whose lips had been partially shorn off during his years of captivity listened with particular gravity.<sup>9</sup> After the presentation, he explained to the Commission officer that he had planned to take his life the next day if he could not secure a

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6. I attended this meeting with Lucy Lapoti, field officer for the Commission, as part of a semester-long internship with Uganda Lawyers for Human Rights. The interview took place in Gulu, Uganda, at the Gulu campus of Uganda's Child Protection Office on November 6, 2012. All of the former abductees wished to remain anonymous, as they had not yet received amnesty from the government. Interview with Former Abductees in Gulu, Uganda (Nov. 6, 2012).

7. *Id.*

8. See The Amnesty Act (Declaration of Lapse), S.I. 2012 No. 34, (2012) (Uganda) (2012) (declaring a lapse in the amnesty provision of the Act in May 2012); see also BLACK'S LAW DICTIONARY 99 (9th ed. 2009) (defining *amnesty* as: "A pardon extended by the government to a group or class of persons, usu. for a political offense; the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted.").

9. See *supra* note 6 and accompanying text.

governmental pardon; the presentation, however, had given him enough hope to refrain.<sup>10</sup>

A few months later, the Ugandan government's reinstatement of the Act changed the Commission officer's untruth into reality. The Gulu returnees, as well as any other low-level applicants that have since defected from the Lord's Resistance Army (LRA), can be granted amnesty until May 2015 when the Act is set to expire again. However, not all former child soldiers will be pardoned.<sup>11</sup>

Unlike the returnees in Gulu, Caesar Acellam Otto and Thomas Kwoyelo remain in indefinite detention.<sup>12</sup> These men were also abducted by the LRA at young ages; they were also compelled to commit atrocities at the threat of losing their lives.<sup>13</sup> Moreover, in 2011, the Ugandan Constitutional Court ruled that Kwoyelo, a high-ranking former child soldier who was captured in action in the Democratic Republic of Congo (DRC), was entitled to amnesty under the blanket provision contained in the Act.<sup>14</sup> Despite this ruling and its affirmation by the Ugandan Court of Appeal,<sup>15</sup> Kwoyelo has been

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10. *Id.*

11. Uganda's Department of Public Prosecutions assured the Irish Ambassador to Uganda that "only the 10 top LRA leaders would" face prosecution without elaborating as to how they would determine what qualifies an LRA member as a "leader" or who these "leaders" were. See Hillary Nsambu & John Agaba, *Revise Amnesty Act - Irish Envoy*, NEW VISION (May 23, 2013), <http://www.newvision.co.ug/news/643088-revise-amnesty-act-irish-envoy.html> [<http://perma.cc/KH38-V2U3>] (archived Jan. 20, 2014).

12. See Moses Akena & David Livingstone Okumu, *State Ignores Court Ruling Over Kwoyelo*, SATURDAY MONITOR (Nov. 13, 2011, 12:00 AM), <http://www.monitor.co.ug/News/National/-/688334/1271924/-/bgurw8z/-/index.html> [<http://perma.cc/LSC6-X4FT>] (archived Jan. 20, 2014) (reporting on the imprisonment of Kwoyelo after a ruling by the International Crimes Division of the High Court that set him free); see also Kane, *supra* note 5 (commenting on the Uganda government's continued confinement of Thomas Kwoyelo and Caesar Acellam); Ojok James Onono, *Stop Abductions to Stop LRA—LRA's Maj. Gen. Caesar Acellam*, THE ACHOLI TIMES (Jan. 20, 2014, 12:00 AM), <http://www.acholitimes.com/index.php/acholi-news/1998-stop-abductions-to-stop-the-lra-lra-s-maj-gen-caesar-acellam> (reporting that Acellam is being held at the 4th Division Barracks in Gulu, Uganda).

13. See Denis Ojwee, *Acellam Flown to Gulu Barracks, Meets Family*, NEW VISION (May 30, 2012), <http://www.newvision.co.ug/mobile/Detail.aspx?NewsID=631497&CatID=1> [<http://perma.cc/RNA3-8QSJ>] (archived Jan. 20, 2014) (reporting that Acellam was abducted from his family garden when he was in secondary school); Reta E. Raymond, *When Two Elephants Fight, It is the Grass That Suffers: Proposed Amnesty Legislation for Peace and Justice*, 40 SYRACUSE J. INT'L L. & COM. 407, 416 (2013) (stating that Kwoyelo was abducted at the age of thirteen and spent 19 years in captivity).

14. Thomas Kwoyelo alias Latoni v. Uganda [2011] UGCC 10 (Const. Pet. No. 036/11) (Uganda) (ruling that Kwoyelo, like other high-level actors in the LRA, is entitled to amnesty under the Act).

15. See Akena & Okumu, *supra* note 12 (citing an order by the Constitutional Court and a ruling by the High Court setting Kwoyelo free).

unofficially held in a Kampala prison for 5 years.<sup>16</sup> Caesar Acellam has been held without charges for 2 years.<sup>17</sup>

While Uganda's reinstatement of its amnesty provision benefits low-level actors like the Gulu returnees, it will not benefit high-level actors such as Acellam and Kwoyelo.<sup>18</sup> Given Uganda's competing interests in ending the decades-long violence and meeting the demands of international criminal law,<sup>19</sup> the disparate treatment of high- and low-level actors would not only be acceptable but advisable. This disparate treatment, however, is not enabled by the amnesty provision that Uganda has extended. Indeed, by not implementing a system for discerning which actors are entitled to amnesty, high-level LRA actors likely are doomed to indefinite detention, and Uganda, as well as other central African nations, remains unprepared to process high-level rebel actors in the event they are seized or surrender.

This Note proposes that the government of Uganda enact a new amnesty provision in May 2015 when the current Act expires. Part II of this Note provides a historical sketch of the origins and activities of the LRA and the government's attempts to reach a peaceful

16. See Moses Akena, *Public Divided over Kwoyelo Trial*, THE DAILY MONITOR (July 10, 2011, 12:00 AM), <http://www.monitor.co.ug/News/National/-/688334/1197660/-/bylc79z/-/index.html> (reporting that Kwoyelo was captured in March 2009).

17. See *id.* at 3 (stating that Acellam was taken into custody in May of 2012 with no further activity on his case).

18. See Nsambu & Agaba, *supra* note 11, at 2 (“[O]nly the top LRA leaders would face the wrath of the law through formal prosecution . . . .”); see also *LRA Commanders*, INVISIBLE CHILDREN, <http://www.lracrisistracker.com/command> (last visited Feb. 20, 2014) (providing information on current LRA commanders).

19. See Louise Mallinder, *Implications of the Expiry of Uganda's Amnesty Act*, FORUM MAG., July 2012, at 27 (2012) (pointing to pressure from the Justice Law and Order Sector (JLOS) as a motivation behind letting Part II of the Act lapse); see generally JUSTICE LAW AND ORDER SECTOR, TRANSITIONAL JUSTICE WORKING GROUP, THE AMNESTY LAW (2000) ISSUES PAPER: REVIEW BY TRANSITIONAL JUSTICE WORKING GROUP 29 (2012), available at <http://www.judicature.go.ug/files/downloads/JLOS-Amnesty%20Issues%20Paper.pdf> [<http://perma.cc/84XU-7JRG>] (archived Jan. 20, 2014) (calling for the end of amnesty and concluding that “Amnesty has largely outlived its originally intended purpose” and is possibly conflicted with Uganda's duties under international law). The JLOS is a government initiative to coordinate the various government agencies that administer justice, maintain law and order, and ensure the protection of human rights. The JLOS monitors and serves the following departments: The Ministry of Justice and Constitutional Affairs (MOJCA); the Ministry of Internal Affairs (MIA); the Judiciary; the Uganda Police Force (UPF); the Uganda Prison Service (UPS); the Directorate of Public Prosecutions (DPP); the Judicial Service Commission (JSC); the Ministry of Local Government (Local Council Courts); the Ministry of Gender, Labor and Social Development (Probation and Juvenile Justice); the Uganda Law Reform Commission (ULRC); the Uganda Human Rights Commission (UHRC); the Law Development Centre (LDC); the Tax Appeals Tribunal (TAT); the Uganda Law Society (ULS); the Centre for Arbitration and Dispute Resolution (CADER); and the Uganda Registration Services Bureau (URSB). *Our History*, JUSTICE LAW AND ORDER SECTOR, <http://www.jlos.go.ug/index.php/2012-09-25-13-11-16/our-history> [<http://perma.cc/SZK4-HDEU>] (archived Jan. 20, 2014) (last visited Jan. 23, 2014).

resolution after decades of violence. Part III locates the role of domestic amnesties in the greater context of international customary and treaty law in the “age of accountability,”<sup>20</sup> arguing for a continued presence of amnesty provisions in transitional justice schemes despite the international trend toward ending impunity. Part IV proposes an amnesty provision that satisfies the need to pardon low-level actors while enabling the Commission to withhold amnesty on a discretionary basis. Lastly, Part V looks forward to the potential application of the proposed provision to the challenging case of Kwoyelo—the first high-ranking member of the LRA to be tried domestically in Uganda. This Part further postulates the extended application of the proposed amnesty to other central African nations that find themselves faced with an onslaught of LRA activity in their territory.

## II. A COMPLICATED HISTORY: THE LRA, THE ACT, AND THE ICC REFERRALS

In the two decades since the beginning of the LRA, the government of Uganda has applied several legal, political, and martial tactics in an attempt to bring peace to a country whose history had been plagued by violence.<sup>21</sup> None of these tactics, however, has been as successful in terms of ending hostilities and removing combatants from the field as a nationwide amnesty.

### A. 1986–2000: *The Beginnings of the LRA and Child Abductions*

The LRA is a nonstate militia rooted in a wave of spiritual, political movements that swept through Northern Uganda in the 1980s.<sup>22</sup> Since its inception, the LRA has had an amorphous political

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20. See Kathryn Sikkink, *The Age of Accountability: The Global Rise of Individual Criminal Accountability*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 19 (Francesca Lessa & Leigh A. Payne eds., 2012) (discussing the meaning of the phrase “age of accountability” and crediting UN Secretary-General Ban Ki Moon with coining the phrase).

21. See generally ANDREAS O’SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 39–42 (2002) (citing Uganda’s history of oppression and civil war and the multiple amnesties granted to the LRA).

22. See TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD’S RESISTANCE ARMY 37–44 (2006) (discussing the beliefs and emergence of the LRA); see also U.N. High Comm’r on Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Mission Undertaken by Her Office, Pursuant to Commission Resolution 2000/60, to Assess the Situation on the Ground with Regard to the Abduction of Children from Northern Uganda*, ¶¶ 12–13, U.N. Doc.

agenda. At times the militia called for government rule based on the Ten Commandments; other times it simply demanded the end of Yoweri Museveni's tenure as president of Uganda.<sup>23</sup> The LRA's founder, Joseph Kony, claims to be possessed by spirits that dictate his actions.<sup>24</sup> He is known for his unspeakably brutal tactics, making him almost as notorious as his movement.<sup>25</sup>

Although the LRA began as one of many resistance movements in the 1980s,<sup>26</sup> it proved to be the most difficult to disarm.<sup>27</sup> Because Museveni's national army, the Uganda People's Defense Force (UPDF), ravaged the Gulu, Pitgum, and Pader districts of Northern Uganda in its attempts to quash the LRA, support for the LRA in these areas initially grew.<sup>28</sup> The LRA also received financial support from the Sudanese government in the early 1990s.<sup>29</sup> Meanwhile, the

E/CN.4/2002/86 (2001) [hereinafter *U.N. Report on Children from Northern Uganda*] (discussing the origins of the LRA). Arguably the tension in Northern Uganda dates back much farther to the rule of Milton Obote and Idi Amin as many of the political alliances and grievances incurred during these periods shaped the formation of groups like the UPDF and the LRA. See CHRIS DOLAN, *SOCIAL TORTURE: THE CASE OF NORTHERN UGANDA, 1986–2006*, at 39–43 (2009).

23. A position Museveni gained through a contentious military coup in 1986. See *U.N. Report on Children from Northern Uganda*, *supra* note 22, ¶¶ 12–14 (stating that the Holy Spirit Movement gained more support in 1986–1987 after the coup by Museveni and that Kony's original stated mission was to install the Ten Commandments).

24. See ALLEN, *supra* note 22, at 38 (detailing spirits supposedly possessing Kony). I was informed about a few of these spirits in an interview I conducted with a formerly abducted person. According to the interviewee—a higher-ranking former LRA member—"George Bush" is a violent spirit who pushes Kony to fight and make war. "Victoria" is a female spirit, who cries when she sees the children that have been abducted. When asked further about these spirits, the interviewee became very agitated and refused to speak further. The Amnesty Commission Field Officer informed me that many LRA members are told that the spirits can hear when they are being spoken of and will report back to Kony what they have heard, leaving many of those who have returned home terrified to speak of the spirits or Kony. Interview with Former Abductee (Anonymous) in Gulu, Uganda (Nov. 8, 2012).

25. See ALLEN, *supra* note 22, at 47, 49, 76 (describing various violent acts committed by the LRA).

26. See *id.* at 37–38 (describing the rise of the LRA).

27. The utter failure of the Ugandan government to protect its citizens from abductions has led some to even place the blame of the massive-scaled human rights violations and violence squarely on the head of Museveni and his administration. See, e.g., Phuong N. Pham, Patrick Vinck & Eric Stover, *The Lord's Resistance Army and Forced Conscription in Northern Uganda*, 30 HUM. RTS. Q. 404, 411 (2008) ("[T]he high number of abductions suggests that the Ugandan government has largely failed to protect civilians from abductions and other assaults by the LRA in northern Uganda.").

28. See Sverker Finnström, *Wars of the Past and War in the Present: The Lord's Resistance Movement/Army in Uganda*, 76 AFRICA 200, 200, 203 (2006) (explaining that the massive upheaval caused by the fighting led many Acholi to initially support insurgency movements such as the LRA).

29. See Kevin C. Dunn, *Uganda: The Lord's Resistance Army*, 31 REV. OF AFR. POL. ECON. 139, 141 (2004) (establishing that there is evidence that the LRA is receiving assistance from specific elements of the Sudanese People's Liberation Army).



Ugandan government funded the South Sudanese rebel group, the Sudanese People's Liberation Army, breeding political instability in Southern Sudan and creating a convenient site for a rebel militia.<sup>30</sup>

In 1999, however, the two governments entered into the Nairobi Peace Agreement wherein they promised to cease providing aid to rebel armies in their respective territories.<sup>31</sup> Following this agreement, Uganda and Sudan also entered into a joint military operation, termed Operation Iron Fist, which aimed to remove LRA operatives from Southern Sudan.<sup>32</sup> Instead of disabling the militia as planned, however, Operation Iron Fist merely drove the LRA back into Northern Uganda.<sup>33</sup> At this time, the LRA began supplementing its numbers by the now infamous process of child abduction.<sup>34</sup>

Once abducted by the LRA, children are subjected to galvanizing experiences such as being compelled to kill or maim their own family members or other children.<sup>35</sup> The LRA uses the ensuing fear of reprisal as a tool to dissuade the children from returning home.<sup>36</sup> The abductees then go through an intense period of integration and homogenization, during which they are trained to wage war and forced to participate in frequent killings.<sup>37</sup> Those that survive integration are assigned to a variety of positions within the army, including carrying supplies, participating in armed hostilities, or, for girls, watching over other children, or becoming sexual consorts for Kony's favored commanders.<sup>38</sup>

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30. See *id.* at 139 (describing Sudan's support of the LRA as a reaction to Uganda's support for the Sudanese People's Liberation Army).

31. See *id.* at 141 ("The Nairobi agreement committed the two governments to cease hostilities against each other and not to harbor, sponsor or give military or logistical support or any rebel or hostile elements from each others' territories.").

32. See *id.* (discussing the objectives of Operation Iron Fist).

33. See *id.* ("Operation Iron Fist had the unintended consequences of pushing the LRA more deeply into Northern Uganda.").

34. See ALLEN, *supra* note 22, at 42 (stating that a key strategy used by the LRA to grow numbers was the abduction of young people).

35. See *id.* at 64, 71 (describing child abduction as a deliberate strategy and recounting stories told by abductees about having to kill their family members); see also Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT'L L. 209, 214 (2008) (noting the use of violence as a means of preventing abductees from running away).

36. See ALLEN, *supra* note 22, at 42 (stating that the LRA required some recruits to commit atrocities against civilians to make it difficult for them to return home).

37. See, e.g., Monica Mark, *Joseph Kony Child Soldier Returns to Terrorised Boyhood Village*, THE GUARDIAN (July 22, 2013), <http://www.theguardian.com/world/2013/jul/23/joseph-kony-child-soldier-return-uganda-lra> (detailing the traumatic initiation experiences of a typical abductee—namely, that he was forced to kill and lick the blood of his victims in order to not be killed himself).

38. See Pham, Vinck & Stover, *supra* note 27, at 409. One of the former abductees I met in Gulu had been forced to carry a pot of boiling-hot food on top of her head for several miles on her first day with the LRA. The burns she suffered on the hand used to keep the pot steady were so extensive her fingers fused to her palm. She

B. 2000–2008: *Navigating Between Amnesty and Prosecution in Negotiating a Cease to Hostilities*

From 1986 to 2006, it is estimated that 54,000 to 75,000 people were abducted by the LRA.<sup>39</sup> The majority of those who have returned from abduction since 2006 have been under 30 years old.<sup>40</sup> While a greater number of abductees were male, female abductees tended to spend the longest time in captivity—an average of about 2 years.<sup>41</sup> From 2002 to 2006 alone, an estimated 22,000 children were taken from their homes, schools, and villages.<sup>42</sup> Thousands of others were displaced by the violence and forced to live in internally displaced person camps that are only now being dismantled.<sup>43</sup>

In late 1999, after almost a decade of wide-spread violence and failed negotiations,<sup>44</sup> leaders of the Acholi tribe—arguably the tribe most affected by LRA activities<sup>45</sup>—began searching for an alternative means to end the conflict.<sup>46</sup> The Acholi leaders called for the passage of an amnesty provision modeled after South Africa’s successful amnesty campaign.<sup>47</sup> By providing amnesty, the Acholi leaders hoped to persuade LRA abductees to escape and return home without fear of recrimination. In response to the Acholi’s petitions and increased international pressure to end the crisis, the Ugandan Parliament enacted the Act.<sup>48</sup>

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was later able to escape but has since been unable to find employment due to the loss of the use of her hand.

39. See *id.* at 410 (noting that this is an estimate because it is likely that less than half of all returnees go through the processing system when they return, meaning that the majority are likely unaccounted for).

40. *Id.* at 406 (stating that 37 percent of returnees were 13–18 years old and 24 percent of returnees were 19–30 years old).

41. *Id.* at 407.

42. *Id.*

43. Interview with Lucy Lapoti, Field Officer, Amnesty Comm’n Gulu Branch in Gulu, Uganda (Nov. 5, 2012).

44. See, e.g., ALLEN, *supra* note 22, at 47–49 (describing Betty Bigome’s failed attempts to facilitate negotiations between Kony and President Museveni in the mid-1990s).

45. See Pham, Vinck & Stover, *supra* note 27, at 410 (describing how a cross-section of the Acholi population reveals a self-reported abduction rate of 48.8 percent between 1986 and 2006).

46. See Keller, *supra* note 35, at 215 (noting that the Acholi were successful in obtaining amnesty legislation and reintegration for rebels).

47. See Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.) (calling for democracy and peace for all South Africans); King, *supra* note 4, at 590 (discussing South Africa’s Truth and Reconciliation Commissions).

48. See DOLAN, *supra* note 22, at 39–51 (discussing the developments before and during the war leading up to the passage of amnesty). International pressure later arose in the form of several statements by the UN under-secretary for humanitarian affairs that brought international attention to the war in Northern Uganda. *Id.* at 55–57.

### Under Part II of the Act:

[A]ny Ugandan who has at any time since the 26th day of January, 1986 [the date of Yoweri Museveni's coup] engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda . . . 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.<sup>49</sup>

To receive amnesty under Part II of the Act, a combatant must merely report to an appropriate military or civil leader to renounce and abandon "involvement in the war or armed rebellion."<sup>50</sup> Notably, in its original form, Part II makes no qualifications as to which combatants are entitled to amnesty and which are not.

Initial response to the amnesty provision was measured, as news concerning the grant of amnesty was slow to reach abductees being held in remote LRA camps.<sup>51</sup> Moreover, violence at the hands of the LRA only increased after its enactment because the LRA was at the height of its power.<sup>52</sup> Sociologist Tim Allen reports that when he visited Gulu in the early 2000s, hundreds of children poured into the city every night, sleeping in door eaves and alleys in order to avoid abduction in the outlying villages.<sup>53</sup> In 2003, responding to additional international and domestic pressure to end the LRA's violent presence in Northern Uganda,<sup>54</sup> President Museveni referred the situation to the Office of the Prosecutor of the International Criminal Court (ICC) under Article 14 of the Rome Statute.<sup>55</sup>

49. Amnesty Act, 2000, c. 294, § 2 (2000) (Uganda), available at <http://www.ulii.org/ug/legislation/consolidated-act/294>.

50. *Id.* § 3.

51. See Keller, *supra* note 35, at 215 ("Although the act was relatively unsuccessful at first, thousands of LRA members had applied by mid-2004 . . .").

52. See DOLAN, *supra* note 22, at 55 (recording a significant increase in abductions from 2002–2003).

53. See ALLEN, *supra* note 22, at 54 (noting how children commute to bigger towns to avoid abduction).

54. See ALLEN, *supra* note 22, at 72–74. Allen points to the 2003 comments of Jan Egeland, the UN under-secretary for humanitarian affairs: "The situation is intolerable and we all agree as an international community, the UN and donors, that this is totally unacceptable. Northern Uganda is the most forgotten crisis in the world." He also highlights the U.S. passage of the "Northern Uganda Crisis Response Act (PL 108-283)" as indicative of the international community beginning to call for an end to the violence in Northern Uganda. *Id.*

55. See Rome Statute of the International Criminal Court art.14, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute] (allowing the ICC to exercise jurisdiction over the crimes listed in Article 5 once referred by a State Party); Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403 (2005) (discussing the referral's possible impact on peace negotiations). In the context of Uganda's referrals, the former ICC prosecutor Jose Moreno-Ocampo determined that the ICC possessed subject matter and personal jurisdiction and subsequently unsealed the arrest warrants for five LRA commanders in 2005—namely, Joseph Kony, Vincent

In response, in 2005, the ICC handed down arrest warrants for five high-ranking LRA leaders, including Kony.<sup>56</sup> These warrants were the first to be issued by the ICC since the court's controversial creation on July 17, 1998.<sup>57</sup> The warrants charged Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya with crimes against humanity (murder, enslavement, sexual enslavement, and rape) and war crimes (cruel treatment of civilians, pillaging, inducing rape, and forced enlistment of children).<sup>58</sup>

Thus, in 2006, when the Ugandan government and the LRA entered into negotiations in the South Sudanese capital of Juba,<sup>59</sup> somewhat absurdly both the domestic amnesty of 2000 and the ICC's threat of prosecution were concurrently in place. In fact, when President Museveni made the referrals to the ICC in 2003, he indicated that the Act would be modified so as to exclude Kony and his commanders from receiving amnesty.<sup>60</sup> The only amendments to the Act, however, came just days before the peace talks in Juba were to begin;<sup>61</sup> moreover, the modifications were ambiguous as to how they would prevent certain LRA officials from gaining amnesty.<sup>62</sup> The 2006 amendments only vaguely added that certain persons "shall not be eligible for grant of amnesty if he or she is declared not eligible by

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Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya; the arrest warrants charge the LRA commanders with numerous counts of war crimes and crimes against humanity. Press Release, Int'l Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004), *available at* [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/press%20releases/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord%20s%20resistance%20army%20%20lra%20%20to%20the%20icc.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/press%20releases/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord%20s%20resistance%20army%20%20lra%20%20to%20the%20icc.aspx) [<http://perma.cc/3F5P-ERB2>] (archived Jan. 20, 2014).

56. See Press Release, Int'l Criminal Court, Warrant of Arrest Unsealed Against Five LRA Commanders (Oct. 14, 2005), *available at* [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/press%20releases/Pages/warrant%20of%20arrest%20unsealed%20against%20five%20lra%20commanders.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/press%20releases/Pages/warrant%20of%20arrest%20unsealed%20against%20five%20lra%20commanders.aspx) [<http://perma.cc/GW52-HS7W>] (archived Jan. 20, 2014) (explaining the issuance of arrest warrants).

57. *Id.*

58. *Id.*

59. See *LRA Rebels Arrive for Sudan Talks*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/5060666.stm> [<http://perma.cc/FEZ4-GY66>] (archived Jan. 20, 2014) (last updated June 8, 2006) (stating that the LRA is preparing for talks in southern Sudan with the Ugandan government).

60. See Keller, *supra* note 35 (showing Museveni's initial intention to amend the Act to allow criminal prosecution of LRA leaders).

61. Uganda's Parliament assented to the amendments on May 24, 2006. See Amnesty (Amendment) Act, 2006, § 2 (2006) (Uganda) *available at* [http://www.unicc.org/documents/Legal/Amnesty\(Ammendment\)%20Act%202006.pdf](http://www.unicc.org/documents/Legal/Amnesty(Ammendment)%20Act%202006.pdf) [<http://perma.cc/KC45-66E4>] (archived Jan. 20, 2014). The LRA contingency arrived in Juba to begin negotiations in early June 2006. See *LRA Rebels Arrive for Sudan Talks*, *supra* note 59.

62. See *infra* Part IV (explaining how the amendments effectively did nothing to change the scope and application of the amnesty).

the Minister [of Internal Affairs] . . . ”<sup>63</sup> To date, this provision has never been exercised by the minister.<sup>64</sup>

Meanwhile, President Museveni implied to the LRA leaders at the Juba negotiations that he would interpret the provisions of the Act to include Kony and other high-level LRA actors should the LRA agree to a cessation of hostilities.<sup>65</sup> Museveni even suggested during the 2006 peace negotiations that his government was willing to ask the ICC to drop the charges against the LRA commanders if they agreed to disarm—an action that in reality would have little bearing on the ICC’s exercise of jurisdiction over the LRA leaders’ cases.<sup>66</sup> The LRA seized this offer, unaware that it was an empty promise, and insisted that the ICC and Ugandan government abandon all formal prosecution efforts before any discussion of disarmament occur.<sup>67</sup>

Despite the parties’ apparent conflicting interests, an agreement was tentatively reached in 2007.<sup>68</sup> The terms of the 2007 Principal Agreement (Agreement), and its subsequent *Annexure* in 2008, reveal a tenuous balance between formal justice processes and “complementary alternative justice mechanisms.”<sup>69</sup> Under the Agreement, alternative justice, i.e. amnesty, is only available to those

63. Amnesty (Amendment) Act, § 2.

64. JUSTICE LAW AND ORDER SECTOR, TRANSITIONAL JUSTICE WORKING GROUP, *supra* note 19, at 7 (“To date no individual has been declared ineligible for amnesty. Such a declaration is long overdue as there was agreement from Government that this would happen before the ICD commenced operations. To date, the ICD has heard one case which is currently sub judice.”).

65. See *‘Amnesty’ for Uganda Rebel Chief*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/5147882.stm> [<http://perma.cc/JV7W-NZFY>] (archived Jan. 20, 2014) (last updated July 4, 2006) (citing Museveni’s promise to grant amnesty to Kony).

66. See Rome Statute, *supra* note 55, at art. 19 (allowing either the accused or a State with jurisdiction to challenge the jurisdiction of the ICC, noting that the State can only oppose jurisdiction on the grounds that it is “investigating or prosecuting the case or has investigated or prosecuted.”); see also Keller, *supra* note 35, at 216 (discussing how this offer of requesting the ICC to drop the charges became explicit in 2006).

67. See *id.* at 218 (discussing how the Agreement required the removal of ICC prosecution); see also *Uganda Rejects Key Peace Demand*, BBC NEWS AFRICA (Feb. 28, 2008, 10:10 AM), <http://news.bbc.co.uk/2/hi/africa/7268529.stm> (“[B]ut the rebels want further assurances and insist the ICC arrest warrants be lifted before a final deal is signed.”).

68. See Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement, Uganda-LRA, June 29, 2007 [hereinafter Agreement on Accountability and Reconciliation], available at [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCcQFjAA&url=http%3A%2F%2Fwww.fides.org%2Feng%2Fdocuments%2Fuganda\\_agreement\\_290607.doc&ei=qdcHU8PzIcWpkAffu4HIBA&usg=AFQjCNG3bB938tcTI-n4Y7H3BwUKBo6Vng&sig2=g7eYLYpMtp2T\\_HoSfWA8A&bvm=bv.61725948,d.eW0](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCcQFjAA&url=http%3A%2F%2Fwww.fides.org%2Feng%2Fdocuments%2Fuganda_agreement_290607.doc&ei=qdcHU8PzIcWpkAffu4HIBA&usg=AFQjCNG3bB938tcTI-n4Y7H3BwUKBo6Vng&sig2=g7eYLYpMtp2T_HoSfWA8A&bvm=bv.61725948,d.eW0) [<http://perma.cc/6UFV-HK7H>] (archived Jan. 20, 2014) (agreeing to take steps toward peace).

69. *Id.* ¶ 5.2.

who do not “bear particular responsibility for . . . crimes amounting to international crimes.”<sup>70</sup> Surprisingly, the Annexure to the Agreement further cemented the government’s commitment to formal criminal prosecutions by stipulating that the government “shall establish a unit for carrying out investigations and prosecutions in support of trials and other formal proceedings envisaged by the Principal Agreement.”<sup>71</sup> Despite the apparent progress made in the peace talks, Kony ultimately refused to surrender in 2008 and fired his two negotiators for failing to apprise him of the terms of the Annexure.<sup>72</sup>

### C. 2008–2013: *Wavering Between Amnesty and Prosecution*

After Kony failed to uphold the terms of the 2006–2008 peace agreement, Uganda prepared to shift from a regime of amnesty to one of prosecution. Following the terms of the Annexure, Uganda created a special court within the High Court for the purpose of prosecuting violators of international crimes—the International Crimes Division.<sup>73</sup> The government faced additional pressure from government prosecutors in the Justice Law and Order Sector who were eager to prosecute newly captured Acellam Otto and Kwoyelo. Shortly thereafter, the government allowed the section that enabled the Commission to grant applications for amnesty to lapse.<sup>74</sup>

70. Agreement on Accountability and Reconciliation, *supra* note 68, ¶ 6.1.

71. Annexure to the Agreement on Accountability and Reconciliation, Uganda-LRA, ¶ 10, Feb. 19, 2008 [hereinafter Annexure to Agreement], available at [http://www.iccnw.org/documents/Annexure\\_to\\_agreement\\_on\\_Accountability\\_signed\\_today.pdf](http://www.iccnw.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf) [<http://perma.cc/M5JE-LE6F>] (archived Jan. 20, 2014). *But see* Joseph Isanga, *The International Criminal Court Ten Years Later: Appraisal and Prospects*, 21 CARDOZO J. INT’L & COMP. L. 235, 268 (2013) (noting that although the Agreement and Annexure were “important political commitments, none were legally binding [and] [n]o bill was subsequently brought before Uganda’s parliament to implement them”).

72. See Scott Baldauf, *When Joseph Kony Almost Came in from the Cold: Juba Peace Talks*, THE CHRISTIAN SCI. MONITOR (Mar. 9, 2012), available at <http://www.csmonitor.com/World/Keep-Calm/2012/0309/When-Joseph-Kony-almost-came-in-from-the-cold-Juba-peace-talks-video> [<http://perma.cc/QT6E-7WHZ>] (archived Jan. 20, 2014) (discussing Kony’s handling of his negotiators and his failure to emerge and sign a deal).

73. See ELISE KEPPLER, HUMAN RIGHTS WATCH, JUSTICE FOR SERIOUS CRIMES BEFORE NATIONAL COURTS: UGANDA’S INTERNATIONAL CRIMES DIVISION 1 (Jan. 2012) (discussing the background behind the establishment of the International Crimes Division).

74. See The Amnesty Act (Declaration of Lapse of the Operation of Part II), S.I. 2012 No. 34 (2012) (Uganda) (providing expiration of the amnesty provisions in Part II); Mallinder, *supra* note 19, at 27 (pointing to pressure from JLOS as a motivation behind letting Part II of the Act lapse); JUSTICE LAW AND ORDER SECTOR, TRANSITIONAL JUSTICE WORKING GROUP, *supra* note 19, at 28 (concluding that amnesty in its current form cannot be maintained); Anne Mugisa, *No More Amnesty for LRA Rebels as Law Expires*, NEW VISION (May 29, 2012), <http://www.newvision.co.ug/news/631450-no-more-amnesty-for-lra-rebels-as-law-expires.html> [<http://perma.cc/B88Q->

In the spring of 2013, however, northern religious leaders responsible for the Act once again prevailed upon the Ugandan parliament to reinstate the lapsed portion of the Act and to empower the Commission to grant amnesty.<sup>75</sup> In addition, the Parliamentary Committee on Defense and Internal Affairs recommended that the amnesty provision be reenacted “to achieve the intention for which it was established.”<sup>76</sup> Perhaps recoiling from the International Crime Division’s failed attempt to prosecute Kwoyelo domestically, Uganda deferred to the northern leaders and empowered the Commission to grant applications for amnesty for two more years.<sup>77</sup>

Meanwhile, in 2012, the LRA relocated its activities to the DRC and the Central African Republic (CAR). A UN report released on December 13, 2012, detailed 180 presumed attacks in the CAR and DRC, resulting in the deaths of thirty-nine civilians.<sup>78</sup> Out of these attacks, 193 persons were abducted—84 from the CAR and 109 from the DRC.<sup>79</sup> “One third of the abductees were children.”<sup>80</sup> In 2012, the LRA’s activities displaced 21,000 people and created 2,400 refugees in the CAR.<sup>81</sup>

UN reports from 2013 suggest “the LRA has increased its activities in the Central African region compared to the end of 2012” and has turned to poaching elephants to support its efforts.<sup>82</sup> In response, Uganda recently announced a renewed effort to capture

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QNHW] (archived Jan. 20, 2014) (expiring Act means rebels will have to go through the judicial process).

75. See Mugerwa, *supra* note 2 (stating that lawmakers voted to extend the Act for two years); see also Makumbi & Owich, *supra* note 2 (citing pressure from northern religious leaders as the force behind reenacting the amnesty provision); Press Release, Refugee Law Project, A Renewed Promise for Peace and Justice: The Reinstatement of Uganda’s Amnesty Act (May 29, 2013), <http://www.refugeelawproject.org/resources/press-releases/328-a-renewed-promise-for-peace-and-justice-the-reinstatement-of-uganda-s-amnesty-act-2000.html> (commending the leaving minister of internal affairs, Hilary Onek, and the Ugandan Parliament for reinstating Part II of the Act).

76. Nelson Wesonga, *Parliament Wants Amnesty for Rebel Combatants Extended*, THE DAILY MONITOR (Apr. 29, 2013), <http://mobile.monitor.co.ug/News/Parliament-wants-amnesty-for-rebel-combatants-extended/-/691252/1761056/-/format/xhtml/-/15awumiz/-/index.html> [<http://perma.cc/T4FH-29H8>] (archived Jan. 20, 2014).

77. Mugerwa, *supra* note 2.

78. See U.N. Secretary-General, *Report on the Activities of the United Nations Regional Office for Central Africa and on Areas Affected by the Lord’s Resistance Army*, ¶¶ 32–33, U.N. Doc. S/2012/923 (Dec. 13, 2012) (examining the details of LRA attacks since the beginning of 2012).

79. *Id.*

80. *Id.*

81. U.N. Secretary-General, *Report on the Situation in the Central African Republic and on the Activities of the United Nations Integrated Peacebuilding Office in That Country*, ¶ 18, U.N. Doc. S/2012/956 (Dec. 21, 2012).

82. *July 2013 Monthly Forecast: Central African Republic*, SECURITY COUNCIL REPORT (June 28, 2013), <http://www.securitycouncilreport.org/monthly-forecast/2013-07/> [<http://perma.cc/S5Y2-S5MT>] (archived Jan. 20, 2014).

Kony and the remaining LRA combatants.<sup>83</sup> In conjunction with soldiers from the African Union, one hundred U.S. military advisers have been deployed to the Central African region to assist the UPDF in their efforts.<sup>84</sup> The UPDF is hopeful that, since the violent coup in the CAR has passed, its mission to capture Kony and the remnants of the LRA will finally come to fruition.<sup>85</sup> And, as recently as November 2013, officials of the struggling CAR government have reported that Kony has initiated tentative negotiations of surrender with the CAR.<sup>86</sup> However, should the LRA finally agree to a cessation of hostilities before May 2015, Uganda, the CAR,<sup>87</sup> and the DRC will have no established mechanism for determining which combatants will receive amnesty and which combatants will be unofficially sentenced to an indeterminate detention like Acellam and Kwoyelo.

### III. AMNESTY IN THE “AGE OF ACCOUNTABILITY”

The last two decades have witnessed an unprecedented movement toward imposing accountability for human rights violations through formal prosecution—leading some to call the present epoch the age of accountability.<sup>88</sup> In the past two decades, the spirit behind the Nuremberg trials and the four Geneva Conventions of 12 August 1949 (Geneva Conventions) has been formalized by the establishment of both temporary and permanent international

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83. See Steven Candia, *Uganda: UPDF Launches Fresh Bid to Capture Kony*, THE NEW VISION (Oct. 6, 2013), <http://www.newvision.co.ug/news/648048-updf-launches-fresh-bid-to-capture-kony.html> [<http://perma.cc/C92S-NCFE>] (archived Jan. 20, 2014) (discussing a new offensive attempting to corner Kony); see also *November 2011 Monthly Forecast*, SECURITY COUNCIL REPORT (Oct. 31, 2011), [http://www.securitycouncilreport.org/monthly-forecast/2011-11/lookup\\_c\\_gIKWLeMTIsG\\_b\\_7811249.php](http://www.securitycouncilreport.org/monthly-forecast/2011-11/lookup_c_gIKWLeMTIsG_b_7811249.php) [<http://perma.cc/89K7-LVFD>] (archived Jan. 20, 2014) (indicating that President Obama announced the deployment of one hundred military advisers to assist in capturing Kony).

84. *November 2011 Monthly Forecast*, *supra* note 83.

85. See Candia, *supra* note 83 (discussing the resumption of military action by the UPDF six months after the coup).

86. See Monica Mark, *Ugandan Warlord Joseph Kony ‘in Talks’ with Central African Republic*, THE GUARDIAN (Nov. 21, 2013), available at <http://www.theguardian.com/world/2013/nov/21/ugandan-warlord-joseph-kony-urged-surrender> [<http://perma.cc/3ZS5-2GEA>] (archived Jan. 20, 2014) (discussing the potential surrender of Kony).

87. The CAR has considered granting amnesty to low-level M23 actors. See *Congo Rules Out Amnesty for Top M23 Rebels*, THE NEW VISION (Sept. 20, 2013), <http://www.newvision.co.ug/mobile/Detail.aspx?NewsID=647436&CatID=435> [<http://perma.cc/HEW4-43G2>] (archived Jan. 20, 2014) (discussing CAR’s consideration of prosecuting rebel leaders).

88. See Sikkink, *supra* note 20, at 19 (discussing the evolution of individual criminal accountability from 1990 to 2010 that eventually was embodied in international law).



criminal justice courts, such as the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and, most notably, the ICC.<sup>89</sup> The Rome Statute Preamble most clearly embodies this trend.<sup>90</sup> It states that one of the primary purposes of the ICC is to ensure “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured.”<sup>91</sup>

An aggressive stance toward violations of crimes against humanity leaves little room for domestic amnesty provisions that may indiscriminately forgive a wide range of crimes—potentially even crimes against humanity, war crimes, and genocide.<sup>92</sup> Thus, a pressing issue in crafting a valid domestic amnesty in Uganda is determining the scope of a state’s duty to prosecute violations of international criminal and humanitarian law.

### A. Domestic Amnesties Under the Rome Statute

Opponents to amnesty have argued “a literal reading of the Rome Statute shows that domestic amnesties are in direct opposition to the purpose and essence of the ICC.”<sup>93</sup> But, amnesty is not the functional equivalent of impunity.<sup>94</sup> Even for States Party to such international human rights treaties as the Genocide Convention or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), a domestic grant of amnesty is presumptively valid “if it only applies to crimes that a

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89. See Scott W. Lyons, *Ineffective Amnesty: The Legal Impact on Negotiating the End to Conflict*, 47 WAKE FOREST L. REV. 799, 815 (2012) (describing the Security Council’s use of Chapter VII to create ad hoc tribunals to prosecute people responsible for serious violations of international law); see also Michael Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L.J. 507, 512–16 (1999) (discussing the general role of the ICC in seeking justice); ALLEN, *supra* note 22, at 13–14 (“[T]he creation of the Hague Tribunal did help clarify and crystallize various issues in international law during the 1990s, as well as extend its potential application. It reconnected it with the idea of international prosecution, something that had been almost entirely ignored since the 1940s.”).

90. See Rome Statute, *supra* note 55, at pmb1. (“Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity . . .”).

91. *Id.*

92. See Michael Kourabas, *A Vienna Convention Interpretation of the ‘Interests of Justice’ Provision of the Rome Statute, the Legality of Domestic Amnesty Agreements, and the Situation in Northern Uganda: A ‘Great Qualitative Step Forward,’ Or a Normative Retreat?*, 14 U.C. DAVIS J. INT’L L. & POL’Y 59, 91 (2007) (discussing the emergence of a “norm of international law prohibiting amnesty agreements protecting those who violate humans rights”).

93. Lyons, *supra* note 89, at 832.

94. See Scharf, *supra* note 89, at 512 (“It is a common misconception that granting amnesty from prosecution is equivalent to foregoing accountability and redress.”).

State has no international requirement to prosecute or extradite for prosecution.”<sup>95</sup> Furthermore, an amnesty provision, if implemented in conjunction with other “justice” measures, such as *mato oput*, a traditional justice mechanism in Uganda, or a Truth and Reconciliation Commission, as implemented in South Africa, can arguably bring an end to impunity through mechanisms other than prosecution.<sup>96</sup>

A generous reading of the Rome Statute’s more ambiguous provisions creates space for domestic amnesties to function within the wide scope of international criminal law. Article 53 of the Rome Statute, for example, was arguably drafted with an amount of “creative ambiguity” in light of the debate over the acceptability of amnesties during its drafting.<sup>97</sup> Under Article 53(1)(c), when determining whether to proceed with an investigation, the prosecutor shall consider whether, “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.”<sup>98</sup> This “interests of justice” provision could allow prosecutors to forgo prosecution if it impedes a more effective system of traditional or alternative justice mechanisms or otherwise disserves the interests of the victims.<sup>99</sup> Additionally, and perhaps

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95. Lyons, *supra* note 89, at 803.

96. Mato oput is a process in which disagreeing clans reconcile. They are first separated from any contact with one another; they then rejoin with a local chief for a ceremony in which symbolic acts are performed and symbolic foods, such as a drink made from a bitter root, are consumed. See Cecily Rose, *Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations*, 28 B.C. THIRD WORLD L.J. 345, 361–64, 387–88 (2008) (giving in-depth description of a mato oput ceremony and other alternative justice mechanisms used by Uganda, Rwanda, and South Africa); see also Michael Newton, *A Synthesis of Community Based Justice and Complementarity* 10–12 (Vanderbilt Univ. L. Sch. Pub. L. & Legal Theory Working Paper No. 12-22, 2012) (discussing traditional justice processes and the need for the ICC prosecutor to respect community-based justice in countries such as Uganda and Iraq). The argument that traditional ceremonies like mato oput constitute reasonable alternatives to prosecution in terms of ending impunity is sufficiently addressed in other literature but beyond the scope of this Note. See, e.g., Eric S. Fish, *Peace Through Complementarity: Solving the Ex Post Problem in International Criminal Court Prosecutions*, 119 YALE L.J. 1703, 1708–10 (2010) (providing further examples of the role of nontraditional justice mechanisms).

97. Scharf, *supra* note 89, at 521–22. *But see* Kourabas, *supra* note 92, at 74 (arguing that context and ordinary meaning of the entire Rome Statute preclude the existence of a valid domestic amnesty for international human rights violations).

98. Akhavan, *supra* note 55, at 415.

99. See Newton, *supra* note 96, at 12–13 (discussing the importance of deferring to the community harmed and its definition of justice). As Scharf notes, however, the decision of the prosecutor to not prosecute in the interests of justice, e.g. in respect of a domestic amnesty, is nonetheless subject to pre-trial review when the issue of whether the amnesty pardons crimes against humanity will likely be considered. Scharf, *supra* note 89, at 524. See also Akhavan, *supra* note 55, at 416

most tellingly, while the Preamble to the Rome Statute identifies the end of impunity as one of the ICC's primary goals, nowhere in the Rome Statute is the duty to prosecute explicitly mandated.<sup>100</sup>

Consequently, a State Party to the Rome Statute could enact an amnesty provision without violating its statutory duties and obligations. Notably, several states have already done so.<sup>101</sup> Colombia, for example, enacted the Peace and Justice Law in 2005, which grants a version of amnesty to demobilized guerillas and paramilitaries in its territory, despite having ratified the Rome Statute on August 5, 2002.<sup>102</sup> Liberia, another signatory to the Rome Statute, also created a Truth and Reconciliation Commission that has the power to grant amnesty in circumstances it deems appropriate.<sup>103</sup> Thus, there is no bright-line requirement for states to pursue a specific (in this case, prosecutorial) course when faced with actions that may constitute violations of the Rome Statute.<sup>104</sup> Moreover, some terms of the Rome Statute suggest the existence of a certain amount of state and prosecutorial discretion in making the choice between amnesty and prosecution.<sup>105</sup>

### B. *The Duty to Prosecute Under International Treaty Law*

In the entire body of multilateral human rights, humanitarian law, and criminal treaties, no explicit prohibition of amnesty exists.<sup>106</sup> The absence of a prohibition, however, is not the equivalent

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(discussing former prosecutor Moreno-Ocampo's deliberations under Article 53 in the context of deciding whether to issue arrest warrants for the LRA leaders).

100. Rome Statute, *supra* note 56, at pmb1.

101. Cf. Queen's University of Belfast, *The Amnesty Law Database*, INCORE, <http://incore.incore.ulst.ac.uk/Amnesty/about.html> [<http://perma.cc/73WS-9XL5>] (archived Jan. 20, 2014) (last visited Jan. 28, 2014) (showing a multitude of amnesty agreements in various countries).

102. L. 975/05, julio 25, 2005, 45.980 DIARIO OFICIAL [D.O.] (Colom.). See José E. Arvelo, *International Law and Conflict Resolution in Colombia: Balancing Peace and Justice in the Paramilitary Demobilization Process*, 37 GEO. J. INT'L L. 411, 436–41 (2006) (describing amnesty as one that does not forgive crimes but offers other benefits such as reduced sentences).

103. See Matiangai Sirleaf, *Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth & Reconciliation Commission for Liberia*, 21 FLA. J. INT'L L. 209, 221–28 (2009) (contrasting the Truth and Reconciliation Commissions in Liberia with the prosecutorial efforts in Sierra Leone).

104. *Id.* at 236.

105. See Akhavan, *supra* note 55, at 415–16 (noting the considerations required by Article 53(c)(1)); Newton, *supra* note 96, at 12–13 (discussing the interests of justice provision and allowing countries to exercise domestic punishments).

106. See Mark Freeman & Max Pensky, *The Amnesty Controversy in International Law*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY 42, 44 (Francesca Lessa & Leigh A. Payne eds., 2012) (questioning the basis of the absolute

of permission;<sup>107</sup> indeed, some duties imposed on states by international treaty law may effectively prohibit the granting of a far-reaching amnesty—namely, the duty to prosecute violators of humanitarian or international criminal law.

### 1. The Geneva Conventions

Each of the four Geneva Conventions imposes a duty on States Party to prosecute “grave breaches” of their provisions.<sup>108</sup> Articles 49, 50, 129, and 146, respectively, state that in the face of grave breaches of the terms of the Geneva Conventions “the High Contracting Parties [shall] undertake to enact legislation necessary to provide effective penal sanctions” and shall “be under the obligation to search for persons . . . before its own courts.”<sup>109</sup> By their own terms, however, the provisions of the first four Geneva Conventions are limited in application to international armed conflicts.<sup>110</sup> Common Article 2 of the four Geneva Conventions defines “international armed conflict” as declared war or other armed conflict that arises between two or more states.<sup>111</sup> Thus, the duty to extradite or

movement toward prosecution in the face of an absence of any treaty prohibiting amnesty).

107. *But cf.* S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, ¶ 44 (Sept. 7) (announcing the famous “Lotus Principle”—namely, that only those actions that are explicitly proscribed by international law are unlawful for a state to perform). This rule has since been cast into doubt (if it has ever even been accepted). *See, e.g.*, Hugh Handeyside, *The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?*, 29 MICH. J. INT’L L. 71 (2007) (discussing various interpretive possibilities for the Lotus Principle and the lack of reliance on it by international courts).

108. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 1(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

109. Geneva Convention I, *supra* note 108, at art. 49; Geneva Convention II, *supra* note 108, at art. 50; Geneva Convention III, *supra* note 108, at art. 129; Geneva Convention IV, *supra* note 108, at art. 146; *see also* O’SHEA, *supra* note 21, at 143 (analyzing prosecutorial obligations under international treaty law).

110. *See* King, *supra* note 4, at n.118 (arguing the duty to prosecute under the Geneva Conventions arises only in the context of international armed conflict); Scharf, *supra* note 89, at 516 (setting forth the same argument); *see also* O’SHEA, *supra* note 21, at 143–45 (outlining the argument for a limited reading of the Geneva Conventions’ duty to prosecute and naming those who support it).

111. Geneva Convention I, *supra* note 108, at art. 2; *see* Lyons, *supra* note 89, at n.24 (noting the definition provided by Geneva Convention I).

prosecute seemingly cannot be applied to conflicts of a noninternational character. In contrast, Common Article 3 of the Geneva Conventions—an article concerned with noninternational armed conflicts—does not contain a similar exhortation to extradite or prosecute violators of its provisions.<sup>112</sup>

Opponents to this line of reasoning counter that trends in international treaty law, set in motion by explicit duties to prosecute in international agreements like CAT, serve as “a basis for an emerging consensus that human rights violations must be investigated and prosecuted” in intranational conflicts as well as international state conflicts.<sup>113</sup> This extension is especially warranted in the context of self-amnesties, or amnesties given by a regime on its way out of power to its own members.<sup>114</sup> Indeed, there is a growing consensus that self-amnesties are de facto derogations of state obligations under international criminal law and are therefore invalid.<sup>115</sup>

However, the International Court of Justice, in a case concerning Nicaragua’s suit against the United States regarding the latter’s support of Contra forces in the 1980s, reinforced the Geneva Conventions’ distinction between international and noninternational conflicts and the respective duties imposed onto States Party.<sup>116</sup> Specifically, the International Court of Justice maintained that the duties imposed in Article 3 “constitute a minimum yard stick,”

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112. See Geneva Convention I, *supra* note 108, at art. 3 (failing to provide a similar duty to expedite as Article 2); see also Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 451, 465 (1990) (“[G]rowing use of such provisions does not reflect a broad obligation to extradite or prosecute.”).

113. See Roht-Arriaza, *supra* note 112, at 466–67 (arguing that the duty to prosecute extends to Protocol II); see, e.g., *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 114 (June 27) (investigating human rights violations in Nicaragua); see also O’SHEA, *supra* note 21, at 158 (“It does not necessarily follow . . . that no obligation to search for and prosecute perpetrators of grave breaches exists in armed conflicts between the armed forces of a High Contracting Party and dissident armed forces.”); Roht-Arriaza, *supra* note 112, at n.76 (analyzing the Nicaragua Case).

114. See Roht-Arriaza, *supra* note 112, at 446–67 (discussing the “increasing tendency in international law to require states to investigate and prosecute serious offenses”); see also King, *supra* note 4, at 582 (outlining the customs of international law with regard to amnesties).

115. See, e.g., Kristin Henrard, *Thea Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MSU-DCL J. INT’L L. 595, 641 (1999) (characterizing self-amnesties as absolutely unacceptable).

116. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 114 (June 27) (applying the principles set forth in Article 3 of each of the Geneva Conventions).

leaving the “more elaborate rules,” such as the duty to prosecute, “to apply to international conflicts.”<sup>117</sup>

Moreover, Additional Protocol II to the Geneva Conventions—a portion of the Geneva Conventions that also applies to noninternational armed conflicts—provides an explicit endorsement of amnesty in certain situations. Article 6(5) of Protocol II affirms: “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict.”<sup>118</sup> Article 6(5) was the centerpiece of the South African Constitutional Court’s decision in *Azapo v. President of the Republic of South Africa*, wherein the court upheld the South African amnesty provision against constitutional attack.<sup>119</sup> In addition, Article 6(5) has been referenced by several other national courts in support of domestic amnesties.<sup>120</sup>

Granted, Article 6(5)’s endorsement of amnesties in periods of intrastate transition is not a tacit approval of all amnesty provisions.<sup>121</sup> As the disparate treatment of self-amnesties shows (Argentina’s was overturned, while Chile’s was upheld),<sup>122</sup> the international legal community is divided as to the validity of amnesties that reach state actors’ crimes against humanity in noninternational conflicts.<sup>123</sup> The South African Constitutional Court,

117. *Id.*

118. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 6(5), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]; see Kate Allan, *Prosecution and Peace: A Role for Amnesty Before the ICC?*, 39 DENV. J. INT’L L. & POL’Y 239, 24–42 (2011) (discussing applications of Article 6(5)).

119. See *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa*, 1996 (4) SA 671, ¶ 50 (CC) (S. Afr.) (upholding South Africa’s amnesty provision); see also Allan, *supra* note 118, at 241 (discussing the courts’ unwillingness to find amnesties unlawful per se).

120. See Freeman & Penksy, *supra* note 106, at 44 (explaining that the majority of courts that have applied Article 6(5) have relied on it as a legal basis for validating or upholding amnesties).

121. See Additional Protocol II, *supra* note 118 (outlining the ability of “authorities in power” to grant amnesty).

122. See King, *supra* note 4, at 586–87 (“The countries’ experiences differ in one major way: the Argentine amnesty was overturned by Argentine courts, whereas the Chilean amnesty was not.”). The Argentine and Chilean amnesties were both created by ruling parties as they were losing power, presumably in an effort to prevent retributive justice. The Argentine amnesty was overthrown by its own courts, but the Chilean amnesty was left in place and is still in place today. Uganda’s amnesty is surely different as it does not apply to state actors—a fact that was determinative in the Constitutional Court’s decision to affirm Kwoyelo’s petition for amnesty. See *Thomas Kwoyelo alias Latoni v. Uganda* [2011] UGCC 10, ll. 370, 400–20 (Const. Pet. No. 036/11) (Uganda) (affirming Kwoyelo’s petition for amnesty).

123. Even King, who is in support of amnesties generally, is opposed to self-amnesties. See King, *supra* note 4, at 583 (arguing that self-amnesties like the ones enacted in Argentina and Chile are not valid as they are not democratically enacted).

however, offered additional support for interpreting Article 6(5)'s language in favor of amnesties.<sup>124</sup> This support is centered on the state's decision-making power in the wake of destructive internal conflict:

[The reconstruction of a state] is a difficult exercise which the nation within such a state has to perform in regard to its own peculiar history, its complexities, even its contradictions and its emotional and institutional traditions. What role punishment should play in respect of erstwhile acts of criminality in such a situation is part of the complexity.<sup>125</sup>

As in many other areas of international law, a state's interest in self-determination and sovereignty serves as a significant buffer against unwarranted intrusion into its decisions—a state's decision to grant amnesty following internal conflict being no exception.<sup>126</sup>

The Geneva Conventions do not impose a duty to prosecute grave breaches of their terms in the context of noninternational armed conflict. In contrast, Article 6(5) of Protocol II offers a textual basis for the recognition of amnesties granted in the context of noninternational armed conflict. This recognition is animated, among other reasons, by the respect accorded to the unique capacity of a nation in the process of rebuilding itself to determine the terms by which aggressors will be brought to justice. That this process may include amnesties given by and to a regime in power remains an unsettled issue.<sup>127</sup> The ambiguity surrounding self-amnesties demonstrates that amnesties granted to nonstate actors will not be overturned on these grounds.

The LRA conflict in Uganda is of a noninternational character. The LRA is a nonstate militia that for nearly two decades operated entirely within the borders of a single country. While the LRA has recently expanded its operations into South Sudan, the DRC, and the CAR, the conflict is still categorized as noninternational as it does not

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124. See *AZAPO v. President of the Republic of South Africa*, 1996(4) SA, ¶ 31 (offering support in dicta for upholding the practice of granting amnesty).

125. *Id.*

126. See, e.g., Jeremy Rabkin, *No Substitute for Sovereignty: Why International Criminal Justice Has a Bleak Future—and Deserves It*, in *ATROCITIES AND INTERNATIONAL ACCOUNTABILITY: BEYOND TRANSITIONAL JUSTICE* 98–100 (Edel Hughes, William A. Schabas & Ramesh Thakur eds., 2007) (arguing that despite hopes of an international justice system, “the world still cannot dispense with [state] sovereignty as the basic, organizing principle in international affairs”).

127. See, e.g., Carmelo Soria Espinoza, Case 11.725, Inter-Am. Comm'n H.R., Report No. 133/99, OEA/Ser.L/V/II.106 doc. 3 rev., at 494, ¶ 76 (1999) (removing the effect of the revocation of Chile's amnesty laws); *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001) (striking down the self-amnesties enacted by Chile and Peru).

involve a conflict between states.<sup>128</sup> Given the Geneva Conventions' distinction between noninternational and international conflicts, the duty to prosecute under the four Geneva Conventions likely does not conflict with a state's grant of amnesty.

## 2. The Genocide Convention

The Genocide Convention<sup>129</sup> does not impose a specific duty to prosecute.<sup>130</sup> Article 4 calls for the punishment of all who commit genocide whether they are government officials or private actors.<sup>131</sup> The term *punishment*, however, is "a matter for adjudication since it is not immediately obvious whether 'punishment' could only entail the kind of investigation, prosecution, trial, conviction, and sentencing normally envisioned as the suite of legal procedures that amnesties foreclose."<sup>132</sup> Indeed, in the context of postgenocide Rwanda, punishment was meted out via the nontraditional justice mechanisms of *gacaca* tribunals.<sup>133</sup>

Likewise, Article 6 stipulates that "persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the

128. Although the LRA is expanding its activities to other states, it is also becoming more and more comprised of members of those states, in a way making it again an intranational conflict.

129. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

130. *But see* King, *supra* note 4, at 598 (assuming punishment to explicitly require prosecution and finding, therefore, an explicit duty to prosecute under the Geneva Conventions).

131. Genocide Convention, *supra* note 129, at art. 4. The Genocide Convention defines *genocide* as:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

*See id. supra* note 129, at art. 2.

132. Freeman & Pinsky, *supra* note 106, at 46.

133. *See* Gerald Gahima, *Alternatives to Prosecution: the Case of Rwanda*, in ATROCITIES AND INTERNATIONAL ACCOUNTABILITY: BEYOND TRANSITIONAL JUSTICE, *supra* note 126, at 159–81 (describing the scope, purpose, and effect of the *gacaca* courts in aiding the punishment of *genocidaires* when the task overwhelmed the International Criminal Tribunal for Rwanda). *Gacaca* tribunals are akin to *mato oput*—they are traditional justice ceremonies. *Id.*



act was committed, or by such international penal tribunal as may have jurisdiction . . .”<sup>134</sup> Trial by a competent tribunal can only occur, however, if persons are not first granted amnesty or brought to justice by some other nonprosecutorial means.<sup>135</sup> Thus, while it is generally not in a state’s interest to allow a crime as grave as genocide to go unpunished, the Genocide Convention imposes no duty to prosecute that which would interfere with or otherwise invalidate a state’s amnesty.

### 3. CAT

Unlike the preceding international treaties, CAT imposes on its signatories a duty to prosecute.<sup>136</sup> Under Article 4, “[e]ach State Party shall ensure that all acts of torture are offenses under its criminal law.”<sup>137</sup> Article 7 further imposes an “extradite or prosecute” requirement on states in whose jurisdiction an alleged torturer is found.<sup>138</sup> For the purposes of CAT, however, “torture” is given a rather narrow definition, encompassing “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>139</sup> Thus, an act constitutes torture only when committed by a state actor or “public official.”<sup>140</sup> Consequently, an amnesty that applies only to nonstate actors does not violate the state’s obligation to prosecute acts of torture.<sup>141</sup>

In rare instances, CAT has been applied to nonstate actors. However, this extension operated under the prohibition against

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134. Genocide Convention, *supra* note 129, at art. 6.

135. Freeman and Pensky seem to take this interpretation for granted as they do not even mention Article 6 in their analysis of the duty to prosecute under the Genocide Convention. See Freeman & Pensky, *supra* note 106, at 46 (neglecting Article 6 in their discussion of the duty to prosecute under the Genocide Convention).

136. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 1, 4, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (imposing a duty to prosecute).

137. *Id.* at art. 4(1).

138. See *id.* at art. 7(1) (“In cases where an alleged torturer has been found within United States territory and the United States does not extradite him or her, article 7 requires that the case be submitted to competent authorities ‘for the purpose of prosecution.’”).

139. *Id.* at art. 1(1).

140. See *id.* (requiring that illegal actions be taken by a public official).

141. The lack of an explicit duty to prosecute perpetrators of torture is not to be confused, however, as a bar on such prosecution; the *right* of a nation or international criminal court to prosecute torturers remains well established. See Rachel Lord, *The Liability of Non-State Actors for Torture in Violation of International Humanitarian Law: An Assessment of the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 4 MELBOURNE J. INT’L L. 112, 129 (2003) (making a distinction between a duty and a right to prosecute).

extraditing persons to a place where they will likely be tortured,<sup>142</sup> not to prosecuting torturers. Further, the nonstate actors were in fact operating in Somalia—a stateless territory—in a “sufficiently state-like” manner.<sup>143</sup> For the purposes of a Ugandan amnesty, the prosecution requirement under CAT is unlikely to be extended to include nonstate actors. The members of the LRA are likely not operating in a sufficiently state-like manner: they have never controlled any amount of territory nor had a consistent or unifying political agenda.<sup>144</sup> Thus, the duty to prosecute the crime of torture would only invalidate a grant of amnesty to state actors—once again questioning self-amnesties, while leaving other grants of amnesty potentially valid.<sup>145</sup>

#### 4. African Charter on Human and Peoples’ Rights

Finally, the African (Banjul) Charter on Human and Peoples’ Rights (Charter) does not impose an explicit duty to prosecute violations of its provisions, although some duties to punish violators of its terms are seemingly implied.<sup>146</sup> In the Preamble, for example, the Charter states, “[T]he enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.”<sup>147</sup> These duties, however, are not confined only to states or to prosecution alone.

142. See Convention Against Torture, *supra* note 136, at art. 3 (“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”).

143. See Sadiq Shek Elmi v. Australia, CAT/C/22/D/120/1998, U.N. Committee Against Torture (CAT), May 25, 1999, available at <http://www.refworld.org/docid/3f588eda0.html> [<http://perma.cc/GCY4-FUGN>] (archived Jan. 20, 2014), as discussed by Curtis Doebbler, *Overlegalizing Human Rights*, 96 AM. SOC’Y INT’L L. PROC. 381, 386 (2002) (“Actions by these nonstate actors in Somalia could be considered sufficiently ‘state-like’ to amount to torture under Article 1 of the CAT—even though those actors were clearly not the state and at no stage indicated that they thought they were the state or were public officials. For purposes of attributing responsibility under international human rights law, they were given imaginary ‘official capacity.’”).

144. U.N. Report on Children from Northern Uganda, *supra* note 22, ¶¶ 13–14 (commenting that “the top leadership of the LRA must remain accountable for [its] crimes. However, it should be noted that the vast majority of LRA fighters are or were child soldiers and are therefore unlikely to be prosecuted for any crimes they may have committed while they were abducted.”).

145. Even with its explicit language, CAT’s duty to prosecute still appears ambiguous to some interpreters. See Freeman & Pensky, *supra* note 106, at 47 (arguing the ambiguity of CAT as compared to the Genocide Convention on this point).

146. See African Charter on Human and Peoples’ Rights art. 1, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter] (“The Member States . . . shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.”).

147. *Id.* at pmb1.

While this analysis is not exhaustive,<sup>148</sup> international treaty law does not appear to impose a strict duty to prosecute except for the duty to prosecute torture as defined by CAT. Thus, an amnesty enacted under the guidelines of these treaties would need to explicitly mention that torture committed by state actors would not be exempt from prosecution.<sup>149</sup> Lastly, as an extra precaution, a state may limit the application of its amnesty to nonstate actors in general as the legitimacy of self-amnesties has been repeatedly questioned.<sup>150</sup>

### C. *Amnesty and the Duty to Prosecute Under Customary International Law*

Customary international law, like international treaty law, neither prohibits a state from granting amnesty nor imposes an absolute duty to prosecute. Customary international law is traditionally defined as “firmly established legal principles reflecting a widespread and consistent practice of states.”<sup>151</sup> Usually, a finding that a rule is a facet of customary international law requires proof of (1) frequent state practice (2) based on the assumption that states have a legal obligation to uphold the rule.<sup>152</sup> Naturally, it is difficult to determine what aspects of treaty and other international law have crystallized into customary law.<sup>153</sup>

Domestic amnesties have arisen concurrently with the global incidences of well-documented crimes against humanity, genocide,

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148. It does not include, for example, the International Covenant on Civil and Political Rights, see International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171, or the International Convention for the Protection of All Persons from Enforced Disappearances, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006), *entered into force* Dec. 23, 2010. *Cf.* Lyons, *supra* note 89, at 806 (commenting on the argument that “the duty to ‘ensure’ these rights creates an affirmative obligation to prosecute violators of such rights, and thus is an invalidation of amnesty”).

149. *Cf.* Lyons, *supra* note 89, at 806 (“Without a specific indication of excluded crimes, the only invalid amnesties are for crimes where there is an established international requirement to prosecute.”).

150. *See, e.g.*, King, *supra* note 4, at 583–85 (noting the rejection of Argentina’s self-amnesty); *see also* Henrard, *supra* note 115, at 641 (calling for the per se invalidity of self-amnesties).

151. Statute of the International Court of Justice, art. 38, para. 1.

152. *See, e.g.*, Freeman & Pensky, *supra* note 106, at 52 (“[T]he legal principle must be factually observed to be a general state practice” and “it must be demonstrable that states conform to the principle in question because they recognize that they are legally obligated to do so.”); *see also* King, *supra* note 4, at 603–04 (“[C]ustomary international law is composed of state practice and *opinion juris* . . .”).

153. *See* King, *supra* note 4, at 603 (“Evaluating the legality of a proposition under customary international law is difficult because it requires pinpointing the moment when the acceptance of a practice or principle became sufficiently widespread to be judged customary.”).

and torture,<sup>154</sup> which suggests that amnesties have risen in response to the now credible threat of prosecution for international crimes.<sup>155</sup> This phenomenon would help explain how, in Uganda, the closer the ICC and its warrants were to the leaders of the LRA, the more valuable amnesty grew as a bargaining chip.<sup>156</sup> Hence, in an ironic twist, the momentum toward ending impunity likely propelled an unprecedented wave of domestic amnesties, making it difficult to determine whether one incipient norm born of the same time can forbid the practice of another as a matter of customary international law.

Indeed, no duty to prosecute crimes designated by customary international law exists.<sup>157</sup> And, no customary international law prohibiting amnesties exists.<sup>158</sup> State practice in the area of amnesty is manifold, and many forms of amnesty have been accepted internationally.<sup>159</sup> The lack of a consensus on the duty to prosecute suggests “amnesties are in fact legal transitional mechanisms under international law.”<sup>160</sup> Furthermore, the United Nations has in the past “pushed for, helped negotiate, and/or endorsed the amnesty as a means of restoring peace and democratic government.”<sup>161</sup> These past amnesties include those enacted by Argentina, Cambodia, Chile, El Salvador, Guatemala, Haiti, Uruguay, and South Africa.<sup>162</sup> The amnesties of Cambodia, El Salvador, Haiti, and South Africa received

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154. Compare King, *supra* note 4, at 605 (“[S]tate practice, from all angles, appears to permit amnesty for human rights abuses, though perhaps to varying degrees”), with Kourabas, *supra* note 92, at 81 (finding a “crystallizing norm reflecting the illegality of amnesty provisions”).

155. See Freeman & Pensky, *supra* note 106, at 56 (“The increased use of amnesties since the early 1990s may actually reflect the growing influence of international criminal law, which now represents a credible threat that perpetrators of the most serious of international crimes will face indictment and prosecution.”).

156. See *supra* Part II.B (discussing the interplay of prosecutions and amnesty in bringing an end to the crisis in Uganda).

157. See O’SHEA, *supra* note 21, at 205 (“It could not be argued that states’ consent to the existence of a crime under international law necessarily implies their consent to a duty to prosecute or even a duty to prosecute or extradite.”).

158. See King, *supra* note 4, at 605 (“The varied practice of states enacting the amnesties or holding the trials is certainly a good indicator that no norm of customary international law prohibiting amnesties exists.”).

159. See Emily W. Schabacker, *Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses*, 12 N.Y. INT’L L. REV. 1, 44 (1999) (concluding after analyzing state practice regarding amnesties: “Under traditional customary international law analysis, the totality of state practice does not clearly support a duty to punish gross violations of human rights.”).

160. King, *supra* note 4, at 618.

161. Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 AUT L. & CONTEMP. PROBS. 41, 41–42 (1996) (weighing the policies for and against granting amnesties).

162. See *id.* at 41 (noting the numerous amnesties that have been granted in the past several years).

the explicit endorsement of the United Nations.<sup>163</sup> Thus, Uganda likely will not violate customary international law by granting amnesty.

#### D. *The Duty to Prosecute in International Jurisprudence*

A duty to prosecute may also arise under case law handed down by the Inter-American Court of Human Rights (IACtHR). As Michael Kourabas argues, “[O]ne can draw an analogy between the provisions of the American Convention that the IACtHR has relied upon [to strike down several American amnesties], and similar provisions in Africa’s analog to the American Convention, the African Charter on Human and Peoples’ Rights.”<sup>164</sup> Indeed, in interpreting the duties imposed by the Inter-American Convention of Human Rights (IACHR), the IACtHR has struck down amnesties enacted by Argentina, Chile, El Salvador, Honduras, Peru, and Uruguay.<sup>165</sup>

In the case of Kwoyelo,<sup>166</sup> the Department of Public Prosecutions of Uganda (DPP)<sup>167</sup> raised a similar argument before the Ugandan Constitutional Court. There, they relied on the case of *Barrios Altos v. Peru*,<sup>168</sup> in which the IACtHR held that the self-amnesty laws of Peru, which “prevented the investigations and prosecution of state agents who were responsible for the assassination of 15 people and injuring 4 others,” were a violation of Peru’s obligations under the IACHR.<sup>169</sup> The Ugandan Constitutional Court, however, was able to distinguish the amnesty provision in *Barrios* from the one enacted under the Act, stating that “we would like to point out that the Act did not grant amnesty to any government official or the UPDF

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163. See *id.* (noting the explicit influence of the United Nations in granting these amnesties).

164. Kourabas, *supra* note 92, at 83 (drawing an analogy between the IACHR and the African Charter in the search for a rule against granting amnesty for human rights violators).

165. See *id.* at 82–83 (noting the amnesties that the IACtHR has struck down in the past 20 years).

166. As mentioned above, the prosecution of Kwoyelo was the first time Uganda attempted to prosecute a high-ranking member of the LRA in a domestic court. See *Thomas Kwoyelo alias Latoni v. Uganda* [2011] UGCC 10 (Const. Pet. No. 036/11). This process was not aided by the fact that Kwoyelo’s situation raises several issues of justice—e.g., if his amnesty application was granted by the Commission, Why then is he being prosecuted? Can the government of Uganda demonstrate the appropriate *mens rea* required to convict Kwoyelo of crimes when Kwoyelo was abducted at a young age? Indeed, so many of the most prescient issues posed by the debate between “peace and justice” are embodied in this single case.

167. The American analog to the DPP is the Department of Justice—the DPP is the legal enforcement branch of the Executive.

168. *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001).

169. *Kwoyelo v. Uganda*, at [2011] UGCC 10, ll. 415–21.

personnel who might have committed offenses under the laws of Uganda or international conventions and treaties which Uganda is party to.”<sup>170</sup> Indeed, unlike the amnesties enacted by Argentina, Chile, El Salvador, Honduras, Peru, and Uruguay, Uganda’s amnesty was an amnesty for the people of Uganda—that is, for nonstate, nonmilitary actors<sup>171</sup>—a relevant distinction. Moreover, the IACtHR’s interpretations of the IACHR are likely only persuasive authorities to nonsignatories.<sup>172</sup>

Moreover, the situation in Uganda is unlike any in which an amnesty has previously been granted. First, as stated by the Ugandan Constitutional Court, many precedential amnesties were granted to state actors, whereas Uganda’s is not.<sup>173</sup> Second, and more importantly, the LRA conflict in Uganda presents a vastly different scenario, as it involves the mass abduction and utilization of children. It is one thing for an international court to strike down an amnesty that stands in the way of bringing willful violators of human rights to justice, as the IACtHR did in *Barrios* (Peru) or *Monseñor Oscar Arnulfo Romero and Galdamez v. El Salvador* (El Salvador).<sup>174</sup> It is another to prosecute those who committed murder, rape, theft, and abduction under the threat of the loss of their own lives or under the extreme psychological conditioning experienced by those abducted by the LRA. While they walk the tenuous middle ground between perpetrators and victims, those abducted by the LRA should not have to be held accountable in the same venues or under the same laws as those responsible for placing them there.

#### E. Peace and Justice: The Legacy of South Africa’s Amnesty

South Africa’s amnesty provision remains one of the most successful grants of amnesty to date in terms of international acceptance and recognition, thus providing a model by which to fashion a similar conditional amnesty for Uganda.<sup>175</sup> One of the most

170. *Id.*

171. See Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 AM. J. INT’L L. 385, 394 (2005) (commenting that “the [Ugandan] president seems to plan to have local courts conduct trials of any accused governmental military or civilian official”).

172. See Kourabas, *supra* note 92, at 91 (noting that “there is some question regarding the actual role of judicial decisions in creating international law”).

173. See *Kwoyelo v. Uganda*, at [2011] UGCC 10, ll. 415–21 (noting that no amnesty was granted to “any government official or [UPDF] personnel” who may have committed crimes).

174. *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001); *Romero and Galdamez*, Case 11.481, Inter-Am. Comm’n H.R., Report No. 37/00, OEA/Ser.L/V/II.106, doc. 3 rev. at 671, ¶ 126 (1999).

175. See Antje du Bois-Pedain, *Accountability Through Conditional Amnesty: The Case of South Africa*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY,

compelling arguments against amnesty, besides its tension with international criminal law, is that amnesty often leaves victims remediless and deprived of the justice their loss requires.<sup>176</sup> Hence, an element of the South African amnesty's success is its ability to address the interests of the victims by providing meaningful investigation into suspected crimes, which produces an attendant public record of illicit actors and actions.<sup>177</sup> South Africa's amnesty provision also succeeds in its thoughtful process of sorting actors and actions that are eligible to receive amnesty from those that are not.<sup>178</sup> By investing this discretion in its Amnesty Committee,<sup>179</sup> South Africa ensured a balance between national reconciliation and the dictates of justice.

In order to be granted amnesty under South Africa's conditional amnesty scheme, an applicant must (1) fully disclose (2) every offense or tort that was classified as political in nature.<sup>180</sup> An action is "political" under the terms of the South African Truth and Reconciliation Act (South African Act) when it is in furtherance of the policies or aims of the group of which the applicant is a member.<sup>181</sup> Factors given by the South African Act to be taken into consideration include:

- a. The motive of the person who committed the act;
- b. The context and gravity of the act;
- c. The objective of the act and whether it was aimed at State or personal property;

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*supra* note 20, at 255–62 (discussing South Africa's conditional amnesty as an effective "transitional amnesty law that "can serve as a blueprint . . . in other political transitions."); *see also* O'SHEA, *supra* note 21, at 42 ("The post-apartheid amnesty process in South Africa is undoubtedly one of the most significant developments in this field. Its benefits and fame will ensure the survival of the institution of amnesty for some time to come.").

176. *See* Freeman & Pensky, *supra* note 106, at 42–65 (highlighting the pros and cons of amnesty provisions).

177. *See* Promotion of National Unity and Reconciliation Act 34 of 1995, § 20(1)(c) (1995) (S. Afr.) [hereinafter TRC Act] ("If the Committee, after considering an application for amnesty, is satisfied that— . . . (c) the applicant has made a full disclosure of all relevant facts, it shall grant amnesty in respect of that act, omission or offence.").

178. *See id.* § 20(3) (delineating the factors by which to consider the nature of the applicant's actions).

179. *See id.* §§ 2–5 (providing that amnesty power be delegated to a committee).

180. *See* du Bois-Pedain, *supra* note 175, at 239 (citing TRC Act, *supra* note 177, §§ 20(1)–(3)) ("In order to receive amnesty, eligible individuals had to apply . . . in respect of an offense or delict classified as political and to make full disclosure thereof.").

181. *See* TRC Act, *supra* note 177, § 20(3) (providing criteria for assessing "political" acts).

- d. Whether the act was executed on the orders of another; and,
- e. The proximity of the act to a pursuant political objective.<sup>182</sup>

Actions taken outside the scope of the responsibilities of the membership or committed “for personal gain or out of personal malice, ill-will or spite, directed against the victim” or solely for personal gain” were not qualified to receive amnesty.<sup>183</sup> Interestingly, in cases where applicants acted on direct orders of a superior, 89.3 percent were granted amnesty.<sup>184</sup> If the applicant could satisfy these requirements, he or she would receive a grant of amnesty for the divulged acts, extinguishing civil and criminal liability.<sup>185</sup>

In its pursuit to hear thousands of amnesty requests,<sup>186</sup> South Africa’s Amnesty Committee held over 250 hearings, where those suspected of gross human rights violations appeared publicly before the committee.<sup>187</sup> These hearings required that victims of the human rights violations be notified.<sup>188</sup> However, only sixteen of the applicants who were denied amnesty were successfully prosecuted.<sup>189</sup>

#### IV. PROPOSAL FOR A NEW AMNESTY ACT IN UGANDA

Crafting an amnesty provision for Uganda requires bridging the gap between the needs and desires of a war-torn region and the demands of an increasingly prosecution-driven field of international

182. See *id.* §§ 20(3)(a)–(e) (setting forth five factors relevant in determining whether an action is associated with a political objective).

183. *Id.* at § 20(3)(i)–(ii).

184. See du Bois-Pedain, *supra* note 175, at 250 (“[A]pplicants who acted on orders in the presence of an operational commander received amnesty in 89.2 percent of cases. The success rate of those who had direct instructions to perform the acts in question stands at 83.9 percent . . .”).

185. See *id.* at 240 (“Amnesty could be granted only to individual applicants and in relation to their personal involvement in a specified act associated with a political objective . . . provided that the applicant had made a full disclosure of the relevant facts. . . . [A]mnesty extinguished any criminal or civil liability in respect of the act . . .”).

186. See *id.* at 242 (noting the committee counted more than seven thousand applicants).

187. See *id.* at 241–42 (reporting that the committee held over 250 public hearings and made 1,100 formal amnesty decisions—“hearable matters were applications . . . that may have involved the commission of a gross human rights violation”).

188. See *id.* at 242–43 (“The committee could only grant amnesty . . . after holding a public hearing of which any traceable victims had been notified.”).

189. See *id.* at 255 (“A review by experienced prosecutors of more than 450 cases handed over by the TRC to the prosecution service identified only sixteen cases in which a successful prosecution seemed feasible.”).



criminal law. The prescribed amnesty includes both facial modifications to the Act as it exists<sup>190</sup> and the addition of a list of relevant factors for the Commission to consider when granting amnesty, as prompted by consideration of the South African Act.

First, a simple measure to ensure that the amnesty is facially valid under international statutory instruments is to state that the amnesty will not be applicable to the crime of torture, as defined by CAT. As discussed in Part III, the only clear requirements to prosecute come from this instrument, and only in the case of state actors.<sup>191</sup> To maintain the dictates of the Geneva Conventions, the amnesty should not be applicable to those engaged in an international armed conflict. Additionally, drawing from international criminal case law and from CAT, amnesties that do not apply to state actors are more likely to be valid and are also less likely to reach those involved in an international armed conflict.

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190. See The Amnesty Act (Act No. 2/2000) (Uganda), available at <http://www.ulii.org/ug/legislation/consolidated-act/294> [http://perma.cc/UB5S-7RZP] (archived Jan. 20, 2014). In relevant part, the Act states:

2. Declaration of amnesty.

(1) An Amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by—

[a] actual participation in combat;

[b] collaborating with the perpetrators of the war or armed rebellion;

[c] committing any other crime in the furtherance of the war or armed rebellion; or

[d] assisting or aiding the conduct or prosecution of the war or armed rebellion.

(2) A person referred to under subsection (1) 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.

3. Grant of amnesty.

(1) A reporter shall be taken to be granted the amnesty declared under section 2[sic] if the reporter—

[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.

*Id.*

191. See *supra* Part III.B.3 (discussing prosecution requirements under CAT).

Thus, by stating that the amnesty is only available to those who are or have engaged in armed conflict as nonstate actors, this approach satisfies both dictates.

Notably, the proposed amnesty will cover crimes against humanity and war crimes. First, as discussed in Part III, there is no explicit duty under international law to prosecute violators of these crimes. Second, amnesty should be granted on a case-by-case basis that is dependent on a number of applicant-specific factors, one of which will be the likelihood that the applicant could be found guilty of crimes against humanity or other violations of the crimes listed under Article 8(2)(e) of the Rome Statute, which enumerates crimes committed during a noninternational armed conflict.

Arguably, the Ugandan Constitutional Court may find these alterations redundant, as a key facet of its decision in *Thomas Kwoyelo v. Uganda* is that the Act, as it existed in 2011 and as it exists now, is compatible with international law.<sup>192</sup> The court's finding rested on the 2006 amendment to the Act that gives the minister of internal affairs the discretion to deny amnesty to certain applicants.<sup>193</sup> This provision, however, places too much discretion in the hands of the Ugandan government in applying its amnesty provision, which in turn increases the risk of noncompliance with international criminal law.

As the Act exists today, Kony and other high-level actors like Kwoyelo are entitled to amnesty, because it is a blanket amnesty with no crimes or persons excluded from its reach.<sup>194</sup> Facially, the 2006 amendment allowed the government of Uganda to ultimately decide whether LRA commanders would be granted amnesty—much like the Liberian or South African Truth and Reconciliation Commissions.<sup>195</sup>

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192. See *Thomas Kwoyelo alias Latoni v. Uganda* [2011] UGCC 10, ll. 590–95 (Const. Pet. No. 036/11) (“There is evidence on record . . . that top commanders of the LRA were indicted by the International Criminal Court under the Rome Statute. Their indictment clearly shows that Uganda is aware of its international obligations, while at the same time it can use the law of amnesty to solve a domestic problem. We have not come across any uniform international standards or practices which prohibit states from granting amnesty.”).

193. See *id.* (“The other concerns . . . about Uganda’s obligation under international treaties and conventions which it has ratified and domesticated, we think . . . were addressed by the provisions of the Act, in that not all rebels were granted amnesty, since the Minister can declare some ineligible for amnesty.”).

194. See The Amnesty Act (Act No. 2/2000) (2000) (Uganda) (“A person referred to under subsection (1) 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.”).

195. See the Amnesty (Amendment) Act, 2006 (2006) (Uganda) (“Notwithstanding the provisions of section 2 of the Act a person shall not be eligible for grant of amnesty if he or she is declared not eligible by the Minister by statutory instrument made with the approval of Parliament.”); see also TRC Act, *supra* note 177, §§ 20(1)(a)–(c) (defining the criteria for amnesty in South Africa, under which the

In reality, the amendment most likely served to give an appearance of compliance with international human rights law. That the amendment was passed weeks before the Ugandan government initiated peace talks with the LRA leaders in 2006 is particularly telling, especially given Museveni's conflicting intimations regarding amnesty and the ICC to the LRA commanders.

Furthermore, despite the 2006 amendment, the minister of internal affairs has never utilized the amended provision.<sup>196</sup> When the Commission referred Kwoyelo's amnesty application to the DPP under Part III of the Act, instead of denying the grant of amnesty or referring the case to the minister of internal affairs under Part II, the DPP did nothing.<sup>197</sup> Because the amendment does little to limit the application of amnesty, unless the political will exists to do so, the Act as it previously existed was merely a single play in the Ugandan government's playbook.

Given Uganda's interest in increasing the predictability and fairness of the application of the Act in accordance with its own and international law, this Note proposes a type of limited amnesty that is in the vein of "partial amnesties"—i.e., those amnesties that are restricted in application to certain persons or acts.<sup>198</sup> In a partial amnesty scheme, transitional justice systems, which include amnesty for certain actors or acts, are complemented but not replaced by prosecutions.<sup>199</sup> A system in which prosecution and amnesty serve as complementary means to the same end reflects an effective balance

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government is provided with sufficient latitude to deny an application); Sirleaf, *supra* note 103, at 226–28 (discussing the Liberian Truth and Reconciliation Commission's ability to make recommendations for both prosecution and for amnesty).

196. See Interview with Nathan Twinomugisha; see also JUSTICE LAW AND ORDER SECTOR, TRANSITIONAL JUSTICE WORKING GROUP *supra* note 19, at 7 (Apr. 2012), available at [http://www.jlos.go.ug/index.php/document-centre/document-centre/cat\\_view/10-transitional-justice/100-amnesty](http://www.jlos.go.ug/index.php/document-centre/document-centre/cat_view/10-transitional-justice/100-amnesty) ("To date no individual has been declared ineligible for amnesty. Such a declaration is long overdue as there was agreement from Government that this would happen before the ICD commenced operations.").

197. See *Thomas Kwoyelo alias Latoni v. Uganda* [2011] UGCC 10, 1. 89 (Const. Pet. No. 036/11) ("The DPP did not give any objective and reasonable explanation why he did not sanction the application of the applicant for amnesty or pardon under the Amnesty Act, like every one else who renounced rebellion. . . . The DPP on his part shirked his obligations under the Act."). Also based on an interview with Nathan Twinomugisha. See Twinomugisha, *supra* note 195.

198. See Sikink, *supra* note 20, at 20 ("Indeed from Latin America to the Asia Pacific, those countries that have made the greatest use of prosecutions also have used amnesties and other transitional justice mechanisms most actively. . . . The combination of amnesty and prosecutions was possible, first, because each amnesty law was different and some exempted certain actors or actions. These partial amnesty laws can and have coexisted with prosecutions, and thus are consistent with individual criminal accountability.").

199. See *id.* ("These partial amnesty laws can and have coexisted with prosecutions, and thus consistent with individual criminal accountability.").

between the international interest in ending impunity for those most culpable and the domestic interest in either justice through nontraditional means, pardon for those not ultimately responsible, or both.<sup>200</sup>

The DPP's decision to grant amnesty to nonstate actors should be guided by the following factors, which are shaped by duties under international criminal law and § 20 of the South African Truth and Reconciliation Act:

Whether the applicant likely committed crimes against humanity or war crimes as defined under Article 7 and Article 8(2)(e) of the Rome Statute.

The level of culpability for actions committed while with LRA, namely:

Nature of enlistment, either abduction or voluntary enlistment;

Age of abduction, if abducted;

Rank or position in organization;

Nature and number of crimes committed after having obtained the age of majority;

Nature and number of crimes committed after having reasonable opportunities for escape;

Nature of reporting, either by capture or voluntarily.

Whether the applicant (a) fully disclosed all actions, and only the actions, (b) committed in furtherance of rebellion against the government.

Utilizing the South African amnesty model, the granting of amnesty should also be predicated on full disclosure of acts committed while in the service of the LRA.<sup>201</sup> Crimes of a particularly grave nature—i.e., those falling under § 1—would be open to the public so as to give victims an opportunity to confront the perpetrator.<sup>202</sup> Ugandan amnesty would depart from the South African provision, however, in that it would be largely granted on the basis of the applicant's actions as a collective whole, not on an action-by-action basis. This divergence reflects the unique nature of the LRA crisis. Indeed, assessing accountability or amnesty on an action-by-action basis would be a difficult endeavor as actions taken by most abducted child soldiers were committed under duress.<sup>203</sup>

200. See, e.g., TRC Act, *supra* note 177 (South Africa's amnesty statute).

201. See *id.* § 20(c) (requiring the amnesty applicant to make "a full disclosure of all relevant facts").

202. See *id.* § 20(2)(5) (mandating that the amnesty commission notify victims).

203. See Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 AM. U. INT'L L. REV. 1131, 1147–73 (discussing the defenses of infancy and duress that could be raised by child soldiers in applying for asylum); see also Paola Konge, *International Crimes & Child Soldiers*, 16 SW. J. INT'L L. 41, 47–54, 61–67 (observing that there is no minimum age of criminal responsibility in international criminal law but that the ICC does not have jurisdiction over persons under the age of 18); Erin Lafayette, Note, *The Prosecution of Child Soldiers: Balancing Accountability with Justice*, 63 SYRACUSE L. REV. 297, 308–14

Most importantly, amnesty under the new provision would be granted on a case-by-case basis. The number of potential low-level, Ugandan reporters is decreasing.<sup>204</sup> Conversely, as the Ugandan army renews its efforts to capture Kony and other LRA leaders,<sup>205</sup> the number of high-level applicants for amnesty will increase. As of now, *Thomas Kwoyelo v. Uganda* sets the precedent that many, if not most, high-level LRA leaders are in fact entitled to amnesty.<sup>206</sup> Thus, the need for a system that sorts persons who are entitled to amnesty from those who, under international criminal law, are not entitled to amnesty grows more imperative. Lastly, a case-by-case analysis allows for further discretionary compliance with international criminal law. By ensuring that its amnesty comports with international criminal law well beyond its basic requirements, Uganda solidifies not only the validity of its amnesty provisions but also its compliance with international criminal law.

#### V. CONCLUSION: APPLYING THE PROPOSED AMNESTY PROVISION TO KWOYELO AND BEYOND

Kwoyelo was the first and only person to be hauled before Uganda's International Crimes Division of its High Court,<sup>207</sup> before the International Crimes Division could hand down a conviction, however, the Ugandan Constitutional Court intervened with a ruling

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(2013) (raising possible defenses of necessity and intoxication for child soldiers and concluding that rehabilitation and reintegration of child soldiers should be the "primary goal" of international criminal law).

204. See generally THE RESOLVE LRA CRISIS INITIATIVE, LRA CRISIS TRACKER: MID-YEAR SECURITY BRIEF, JANUARY–JUNE 2013, at 4–10 (2013), available at <http://reports.lracrisistracker.com/pdf/2013-MY-LRA-Crisis-Tracker-Mid-Year-Security-Brief.pdf> [<http://perma.cc/BN6E-YPEX>] (archived Jan. 20, 2014). Abduction activity is shifting toward the CAR and the DRC. See *id.* at 4 (noting that there are only 180–200 Ugandans estimated to remain within the LRA).

205. See Candia, *supra* note 83 (discussing the Ugandan-led African Union's new military actions against the LRA).

206. See *Thomas Kwoyelo alias Latoni v. Uganda* [2011] UGCC 10 (Const. Pet. No. 036/11) ("Indeed in terms of section 3(2) of the Act, [Kwoyelo], as a reporter 'shall also be deemed to be granted amnesty...[sic]' Once he declared to the prison officer that he had renounced rebellion and declared his intention to apply for amnesty under the Act. . . . [The Director of Public Prosecutions] has failed to furnish any reasonable or objective explanation why [Kwoyelo] should be denied equal treatment under the Amnesty Act.").

207. See Alexis Okeowo, *Thomas Kwoyelo's Troubling Trial*, THE NEW YORKER (July 21, 2012), <http://www.newyorker.com/online/blogs/newsdesk/2012/07/thomas-kwoyelos-troubling-trial.html> [<http://perma.cc/FWY6-W6CW>] (archived Jan. 20, 2014) ("Kwoyelo is the first L.R.A. rebel on trial for crimes committed during his time in the rebel group.").

that Kwoyelo was entitled to amnesty.<sup>208</sup> This conclusion displeased the Ugandan government<sup>209</sup>—perhaps justifiably: Kwoyelo, who claims he was abducted, was one of the highest-ranking officials in the LRA, serving for many years after attaining the age of majority and after having many opportunities to escape.<sup>210</sup> Yet, under the letter of the current law, he is entitled to amnesty.<sup>211</sup>

Under the provision proposed above, however, the Commission could have more control in excluding those, like Kwoyelo, who have committed gross violations of human rights from receiving amnesty under § 1. In addition, the Commission could rely on the circumstances of Kwoyelo's abduction and reporting—namely, that he came into custody through capture rather than defection, which suggests a higher degree of culpability for his actions on behalf of the LRA under § 2. In contrast, his full disclosure of his past actions may influence analysis under §§ 1–2 and weigh in favor of granting amnesty. Whatever the outcome of this balancing test, the Commission will at least have a legally sound and predictable method by which to either grant amnesty or refer cases to the DPP for trial. Without such a mechanism, Kwoyelo and others like him could face indefinite detention and their victims could go without justice.<sup>212</sup>

Beyond the disturbing case of Kwoyelo<sup>213</sup> lie both a fresh wave of abductions in the DRC and CAR and a fresh wave of defections.<sup>214</sup>

208. See Mark Schenkel, *The Only LRA Trial in Deadlock*, RADIO NETHERLANDS WORLDWIDE (Mar. 28, 2012, 2:21 PM), <http://www.rnw.nl/africa/article/only-lra-trial-deadlock> [<http://perma.cc/L997-26GR>] (archived Jan. 20, 2014) (discussing the controversy surrounding Kwoyelo's trial, potential entitlement to amnesty, and continued detention).

209. See *id.* (“Kwoyelo remains imprisoned despite last year’s rulings from both the Constitutional Court and the Court of Appeal that he is entitled to amnesty. To deny Kwoyelo amnesty is discriminatory as other LRA members did benefit, the courts reasoned. But Kwoyelo is still detained on technicalities while the attorney general seeks a ruling from the Supreme Court.”).

210. See generally Okeowo, *supra* note 207 (“The L.R.A. had murdered Kwoyelo’s father, kidnapped him as a young boy, and then indoctrinated him into the ranks of the rebel group by forcing him to kill friends and relatives. Four years ago, he was finally captured, in a bloody battle, in the Democratic Republic of the Congo.”).

211. See *Thomas Kwoyelo alias Latoni v. Uganda* [2011] UGCC 10, I. 610 (Const. Pet. No. 036/11) (holding that Kwoyelo had a legal right to be granted “amnesty or pardon under the Amnesty Act, like everyone else who renounced rebellion”).

212. See Kane, *supra* note 5 (discussing the complications and controversy surrounding the stalled criminal trial of Kwoyelo).

213. See Okeowo, *supra* note 207 (“In Kwoyelo’s case, the government is now in the embarrassing position of arguing that its own amnesty legislation was unconstitutional so that it can try him for a tall list of crimes against humanity like murder, mutilation, and kidnapping.”).

214. See U.N. Secretary-General, *Report on the Situation of Children and Armed Conflict Affected by the Lord’s Resistance Army*, ¶¶ 2, 15–43, U.N. Doc. S/2012/635 (May 25, 2012) (examining the details of LRA attacks in the CAR, DRC, and South Sudan since the beginning of 2012); see also *Ugandan LAR Rebels Surrender in CAR*, BBC NEWS AFRICA (Dec. 11, 2013, 8:47 PM), <http://www.bbc.co.uk/news/world-africa->

The DRC and CAR may shortly find themselves in a situation similar to Uganda and should think proactively about their interests in rehabilitating former abductees and their obligations under international human rights and criminal law. The provision outlined above allows them to do that.

The world has changed since the year 2000 when Uganda first enacted the Act. The influence of the ICC's involvement in the hunt for the LRA leaders cannot be understated, not only in the LRA conflict in Uganda but also in the global shift toward prosecution for the world's most notorious criminals. This shift is merely echoed in the creation of Uganda's International Crimes Division and its first trial of Thomas Kwoyelo who, before the intervention of the ICC, would simply have been granted amnesty under the terms of the Act. The fact that he is caught between these two shifting paradigms perhaps says more about the far-reaching effects of the international trend toward ending impunity than the Rome Statute itself.

*Stella Yarbrough\**

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25333345 [<http://perma.cc/VD6A-FM9Z>] (archived Jan. 20, 2014) (discussing the surrender of nineteen LRA fighters in the CAR following a recent offensive by the Ugandan army).

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